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DOCTOR OF PHILOSOPHY

**A Legal Proposal for the Creation of Conservation Agreements in Thailand
A Comparative Study**

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A Legal Proposal for the Creation of Conservation Agreements in Thailand: A Comparative Study

Surasak Boonrueang

Submitted in accordance with the requirements
for the degree of Doctor of Philosophy

The University of Dundee

July 2020

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TABLES AND ABBREVIATIONS

Table of abbreviations

Organisations/ governmental bodies

ALRO	Agricultural Land Reform Office (Thailand)
DEFRA	Department for Environment, Food and Rural Affairs (United Kingdom)
EU	European Union
ISO	International Organization for Standardization
IUCN	International Union for Conservation of Nature
OECD	Organisation for Economic Co-operation and Development
ONEP	Office of the Natural Resources and Environmental Policy and Planning (Thailand)

Statutes

BCA 2016 (NSW)	Biodiversity Conservation Act 2016 (NSW)
BCA 2016 (WA)	Biodiversity Conservation Act 2016 (WA)
CA 1968	Countryside Act 1968 (CA 1968)
CCC	Civil and Commercial Code (Thailand)
CHSR 2017	Conservation of Habitats and Species Regulations 2017, SI 2017/1012
EPBCA 1999	Environmental Protection and Biodiversity Conservation Act 1999 (Commonwealth)
IRC	Internal Revenue Code (USA)
NERCA 2006	Natural Environment and Rural Communities Act 2006
NPACA 1949	National Parks and Access to the Countryside Act 1949

TC(S)A 2003	Title Conditions (Scotland) Act 2003
UCEA	Uniform Conservation Easement Act
WCA 1981	Wildlife and Countryside Act 1981

Specific terms

CA	conservation agreement
C&C	command and control
Law Com	Law Commission
VEA	voluntary environmental agreement
SSSI	site of special scientific interest

Glossaries

CAP	Common Agricultural Policy
NCED	National Conservation Easement Database
NSW	New South Wales
REDD+	Reducing Emissions from Deforestation and forest Degradation
UK	United Kingdom
USA	United States of America
WA	Western Australia

Table of cases

Jurisdiction	Case name
Australia	<input type="checkbox"/> Mabo v Queensland (No 2) (1992) 175 CLR 1
Thailand	<input type="checkbox"/> Supreme Court Decision 8486/2553 (2010) <input type="checkbox"/> Supreme Court Decision 17167/2555 (2012)
UK	<input type="checkbox"/> Boggis v Natural England and Waveney District Council [2008] EWHC 2954 (Admin); [2009] EWCA Civ 1061
USA	<input type="checkbox"/> United States v Albrecht 496 F2d 906, 5th Cir (1974) <input type="checkbox"/> Tennessee Environmental Council, Inc v Bright Par 3 Associates, LP, 2004 Tenn App LEXIS 155, 2004 WL 419720

Table of statutes/bills/conventions

Jurisdiction	Name of statute/bill
Australia	<input type="checkbox"/> Biodiversity Conservation Act 2016 (NSW) <input type="checkbox"/> Biodiversity Conservation Act 2016 (WA) <input type="checkbox"/> Biodiversity Conservation Regulation 2017 (NSW) <input type="checkbox"/> Conservation and Land Management Act 1984 (WA) <input type="checkbox"/> Endangered Species Protection Act 1992 (Commonwealth) <input type="checkbox"/> Environmental Protection and Biodiversity Conservation Act 1999 (Commonwealth) <input type="checkbox"/> Heritage of Western Australia Act 1990 (WA) <input type="checkbox"/> Income Tax Assessment Act 1997 (Commonwealth) <input type="checkbox"/> National Parks and Wildlife Act 1974 (NSW) <input type="checkbox"/> National Trust of Australia Act (WA) 1964 (WA) <input type="checkbox"/> Native Vegetation Conservation Act 1997 (NSW) <input type="checkbox"/> Nature Conservation Act 1992 (Queensland)
Thailand	<input type="checkbox"/> Act on Establishment of Administrative Courts and Administrative Court Procedure BE 2542 (1999) <input type="checkbox"/> Administrative Procedure Act BE 2539 (1996)

Jurisdiction	Name of statute/bill
	<input type="checkbox"/> Agricultural Economics Act BE 2522 (1979) <input type="checkbox"/> Agricultural Land Reform Act BE 2518 (1975) <input type="checkbox"/> Civil and Commercial Code <input type="checkbox"/> Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992) <input type="checkbox"/> Farmer Aid Endowment Act BE 2557 (2014) <input type="checkbox"/> Land Code <input type="checkbox"/> Land Excavation and Land Filling Act BE 2543 (2000) <input type="checkbox"/> Mineral Act BE 2560 (2017) <input type="checkbox"/> National Park Act BE 2562 (2019) <input type="checkbox"/> Official Information Act BE 2540 (1997) <input type="checkbox"/> Right Over Leasehold Asset Act BE 2562 (2019) <input type="checkbox"/> Town Planning Act BE 2562 (2019) <input type="checkbox"/> Wild Animal Preservation and Protection Act 2562 BE (2019)
UK	<input type="checkbox"/> Agriculture Act 1986 <input type="checkbox"/> Conservation of Habitats and Species Regulations 2017, SI 2017/1012 <input type="checkbox"/> Contracts (Rights of Third Parties) Act 1999 <input type="checkbox"/> Contract (Third Party Rights) (Scotland) Act 2017 <input type="checkbox"/> Countryside Act 1968 <input type="checkbox"/> Environment Bill introduced to the House of Commons in January 2020 (Environment Bill HC Bill (2019-20) [9]) <input type="checkbox"/> Environment (Wales) Act 2016 <input type="checkbox"/> Environmental Information Regulations 2004, SI 2004/3391 <input type="checkbox"/> Environmental Information (Scotland) Regulations 2004, SSI 2004/520 <input type="checkbox"/> Forestry Act 1967 <input type="checkbox"/> Land Registration Act 2002 <input type="checkbox"/> National Parks and Access to the Countryside Act 1949 <input type="checkbox"/> National Trust Act 1937 <input type="checkbox"/> Natural Environment and Rural Community Act 2006

Jurisdiction	Name of statute/bill
	<input type="checkbox"/> Settled Land Act 1925 <input type="checkbox"/> Title Conditions (Scotland) Act 2003 <input type="checkbox"/> Wildlife and Countryside Act 1981
USA	<input type="checkbox"/> Agriculture Improvement Act of 2018 (Farm Bill 2018) <input type="checkbox"/> Food Security Act 1986 <input type="checkbox"/> Migratory Bird Hunting and Conservation Stamp Act 1934 <input type="checkbox"/> Uniform Conservation Easement Act ⁱ
International treaties and instruments	<input type="checkbox"/> Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 <input type="checkbox"/> Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700 <input type="checkbox"/> Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, entered into force 4 November 2016 <input type="checkbox"/> United Nations, 'Report of the United Nations Conference on Human Environment' (A/CONF.48/14/REV.1, Stockholm, Sweden, June 5-16, 1972)

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ⁱ A separate table of state legislation is given in the Appendix.

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DECLARATION

I, Surasak Boonrueang, hereby declare that I am the author of this thesis. I have composed all parts of this thesis myself. All quotations have been distinguished by quotation marks and the sources of information specifically acknowledged. This thesis has not been previously accepted for a higher degree at the University of Dundee or other universities.



Surasak Boonrueang

ABSTRACT

A ‘Conservation Agreement’ (CA) is a voluntary conservation tool implemented in many jurisdictions to conserve features on land. Its very nature as a private law instrument imposing obligations running with the land, even when it changes hands, makes a CA different from a simple private agreement and other conservation techniques which operate on the basis of command and control regulation. This conservation technique is in place in Australia, the UK and USA, but not in Thailand, where the laws relating to land conservation are mostly reliant on command and control regulation.

This thesis explores the potential for legal development of CAs in Thailand. It employs a doctrinal research approach and comparative analysis of law to uncover whether a legal framework for the establishment of CAs should be made and if so, what provisions should be proposed to make them operate alongside existing laws relating to nature conservation.

The concepts of environmental regulation and voluntary environmental agreements are reviewed as underlying ideas behind the laws in place in Thailand and the comparator jurisdictions. They uncover the room for implementing CAs to work alongside command and control measures. A doctrinal research method is used to illustrate the application of the relevant laws in Thailand and the comparator jurisdictions, as well as to identify the room for the establishment of CAs in Thailand. The use of a comparative technique by comparing and analysing strengths and weaknesses of CA-enabling laws implemented in Australia, the UK and USA uncovers standard legal features of CA-enabling laws and identifies their strengths and weaknesses. These findings are subsequently employed to develop a possible legal model for Thailand.

After the comparative study has been conducted, this thesis develops and proposes a legal proposal for Thailand. The thesis also identifies strengths and weaknesses of the proposal and suggests some limitations of the legal proposal and room for further study.

This thesis provides two original contributions to academia. The first is the examination of how the application of CA-enabling laws can be analysed from regulatory and legal perspectives. The second is the creation of a legal proposal for the implementation of CAs in Thailand.

Chapter 1 Introduction

1. Research background

It is widely accepted that human beings are now in the age of the Anthropocene, a geologic period where human activities overwhelmingly cause significant change to the environment on Earth.¹ Human activities carried out on land are one of the major causes of such change. Land clearing for agriculture, for instance, not only poses a major threat of biodiversity loss² but also causes land degradation³ and contamination. The latter affects both human health and the well-being of nature as illustrated in the popular literature, for example ‘Silent Spring’ published in 1962.⁴ Arguably, environmental problems from human activities took place not only because of humans’ need and greed,⁵ but also the influence of the legal recognition of property rights,⁶ specifically ownership.⁷ The endorsement of ownership on land can be seen as a legal factor endorsing the exercise of rights over the land, which contributes to the overexploitation of natural features on land, which in turn causes environmental degradation.⁸

One of the tools that can be used to deal with the problems arising from unregulated activities or overuse of natural resources on land is the use of law to control or intervene in human activities on land.⁹ Nonetheless, current legal regimes employed

¹ Erle C Ellis, *Anthropocene: A Very Short Introduction* (OUP 2018) 1; Robin Attfield, *Environmental Ethics: A Very Short Introduction* (OUP 2018) 2.

² Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (OUP 1998) 271. See also the work arguing that human-made activities nowadays are a major cause of the sixth mass extinction in Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* (Henry Holt and Company 2014).

The evidence of the significance of biodiversity loss at the global level can be observed from the introduction of the Convention on Biological Diversity at the Earth Summit in 1992.

³ Ben Boer, ‘Land Degradation’ in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019) 440.

⁴ See Rachel Carson, *Silent Spring* (Houghton Mifflin 1962) which mainly explains how the use of pesticides in the USA caused various significant harm to nature.

⁵ Ian Gough, *Heat, Greed and Human Need: Climate Change, Capitalism and Sustainable Wellbeing* (Edward Elgar 2017).

⁶ David Grinlinton, ‘The Functions of Rights of Property in Environmental law’ in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016) 391.

⁷ See Gerry Bates, *Environmental Law in Australia* (8th edn, LexisNexis Butterworths Australia 2013) paras 3.2-3.4.

⁸ Christopher Rodgers, ‘Nature’s Place? Property Rights, Property Rules and Environmental Stewardship’ (2009) 68(3) *Cambridge Law Journal* 550, 561; James L Huffman, ‘Land Ownership and Environmental Regulation’ (1999) 25 *Ecology Law Quarterly* 591, 594.

⁹ Gunningham, Grabosky and Sinclair (n 2) 279; Garrett Hardin, ‘The Tragedy of the Commons’ (1968) *Science* 162 (3859) 1243, 1245; Garrett Hardin, ‘Extensions of “The Tragedy of the Commons”’ (1998) *Science* 280 (5364) 682, 683.

in several jurisdictions, including Thailand,¹⁰ are suffering from various legal problems. They include the absence of, or weakness in, legal provisions preventing or controlling land degradation and promoting sustainable land use.¹¹ In addition, the laws in several jurisdictions are heavily reliant on direct regulation (command-and-control (C&C) regulation),¹² which has some limitations. For instance, it merely imposes a minimum requirement of the duty not to cause significant harm to the environment but fails to encourage landowners to perform practices beyond a minimum legal standard.¹³ In Thailand, several government reports and policies have highlighted the need to reform the existing environmental laws due to their insufficiency or obsolescence in dealing with environmental problems.¹⁴

Apart from that, the established legal measures regarding the recognition of property rights on land and land-use regulation are insufficient to facilitate the establishment of a voluntary legal tool to ensure the long-term conservation of natural features on land.¹⁵ Several methods could be used to refine and strengthen the current regime; and one among these is the use of conservation agreements (CAs) as an alternative and subsidiary tool of formal regulation.¹⁶ It appears that this regulatory style conforms to the global trend, whereby the use of more varied regulatory techniques, rather than a single one, is supported.¹⁷ The search for more diverse methods is not just a fashion but a realisation that the best results will come from a varied ‘toolkit’. This thesis

See how the law can be used to intervene in human activities in chapter 2.

¹⁰ See Surasak Boonrueang, ‘Terrestrial Biodiversity Conservation Law in Thailand: A Preliminary Illustration of Applicable Laws and Their Limitations’ (2019) 12 Naresuan Law Journal 23, 39.

¹¹ Boer (n 3) 439.

¹² In short, C&C regulation involves the government’s intervention, mostly by exercising legal power, to require individuals and a private sector to do or not to do specific activities under prescribed conditions. In the case that regulated persons are failing to fulfil such requirements, they might be sanctioned with specific measures by public authorities.

¹³ See the limitations of C&C regulation in Gunningham, Grabosky and Sinclair (n 2) 45; Cass R Sunstein, ‘Paradoxes of the Regulatory State’ (1990) 57 University of Chicago Law Review 407, 420.

¹⁴ See Office of the Natural Resources and Environmental Policy and Planning (ONEP), ‘National Policy and Plans for the Enhancement and Conservation of National Environmental Quality 2560-2578 BE’ (ONEP 2018) 131-33; Commission of the National Reform, ‘The National Reform Plan: Book 4 (Natural Resources and the Environment)’ (2018) 13-16 (published in the Royal Gazette Book 134, Part 24ⁿ on 6 April 2018).

¹⁵ See the limits of the existing regime as will be examined in section 1.2 of chapter 6.

¹⁶ Cyrille de Klemm and Clare Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* (Environmental Policy and Law Paper No 29, IUCN 1993) 134.

¹⁷ See this justification in more detail in section 4.1 below.

See also Colin T Reid and Walters Nsoh, *The Privatisation of Biodiversity?: New Approaches to Conservation Law* (Edward Elgar 2016) 2; Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (2nd edn, OUP 2019) Ch 4; Hardin, ‘The Tragedy of the Commons’ (n 9) 1245; Hardin, ‘Extensions of “The Tragedy of the Commons”’ (n 9) 682.

proposes that one of the voluntary choices worth examining is the use of CAs to impose burdens on the agreeing and bound landowners to conserve some natural features on privately-owned land.¹⁸ However, as will be identified and argued in this chapter, chapter 4 and chapter 6,¹⁹ the existing Thai laws seem insufficient to accommodate the creation of this conservation tool, and a new legal framework should be made. It is the primary purpose of this thesis to examine the room to develop such a new legal framework. This argument will be the basis for the examination of various theoretical and legal considerations throughout this thesis.²⁰

2. Research objectives, questions and hypothesis

As indicated in the research title, this study involves investigating the development of a legal scheme enabling the implementation of CAs by a comparative technique, and the primary objectives are:

- 1) To explore the potential values and applicability of voluntary agreements and CAs implemented elsewhere;
- 2) To analyse the room to develop a legal proposal for the establishment of this conservation technique in Thailand; and
- 3) To propose the legal provisions that could be made for the country.

This thesis sets the overarching research question to fulfil the above research objectives as follows:

Whether a legal framework for the establishment of conservation agreements should be made for the conservation of natural features on land, and if it should be, what provisions should be made for the establishment of CAs to work alongside existing laws for nature conservation on land?

¹⁸ The term ‘privately-owned land’ in the context of Thailand is the parcels of land where individuals are entitled to hold ownership or possessory rights under various laws. See a comprehensive examination in this point in sub-section 2.1.4.2 (privately-owned land) of chapter 4.

¹⁹ See the comprehensive discussions relating to the current gaps in the Thai law in establishing CAs at section 1.2 of chapter 6.

²⁰ See the justifications for the selection of this tool in section 4.1 and the preliminary definition and in part 6 below.

The above question will fulfil the research objectives by employing a comparative study of the selected CA enabling laws in the comparator jurisdictions.²¹ The findings drawn from such a comparative study will be used to analyse whether and how to develop the legal proposal for Thailand.

As this study will be divided into various chapters, it is necessary to identify the subsequent research questions to be investigated in each chapter, as well as justify how they are interconnected to the overarching one. The sub-research questions are set in the following order:

- 1) *What are the relevant fundamental concepts and tools for environmental regulation? How are they relevant to the understanding of the existing rules of land-use control and nature conservation on land in Thailand and the comparator jurisdictions?* These questions will be examined in chapter 2 (regulation: fundamental concepts and available tools for environmental regulation).
- 2) *What are the relevant fundamental concepts and ideas behind the use of voluntary agreements as a form of environmental regulation? How are they relevant to the understanding of the nature of CAs and helpful in developing a proposed legal model for Thailand?* These questions will be examined in chapter 3 (fundamental concepts of voluntary environmental agreements).
- 3) *What are the key existing problems and gaps, motivations for reform, and legal principles, which are relevant to or support the creation of CAs in the Thai context?* This question will be addressed in chapter 4 (land rights, land-use regulation and nature conservation in Thailand).
- 4) *What are the design choices that can be drawn from the selected CA-enabling laws²² implemented in the comparator jurisdictions? What are their strengths and weaknesses when considered from the legal and regulatory perspectives?* These questions will be examined in chapter 5 (the comparison of the selected CA-enabling laws).

²¹ See the justification for the selection of a research approach and the jurisdictions for this comparative study in sections 4.2 and 4.3 below.

²² The words 'CA-enabling law(s)' will be used throughout this thesis by referring to the statute(s) which allow(s) a particular body to make a CA with qualified persons. This type of law can be a stand-alone statute enacted to fulfil this objective or another having specific legal provisions entitling to make a CA. This term is developed from the definition of conservation easement-enabling statutes in place in the USA (Nancy McLaughlin and Jeffrey Pidot, 'Conservation Easement Enabling Statutes: Perspectives on Reform' (2013) 3 Utah Law Review 811, 848).

- 5) *Whether or not a CA scheme should actually be introduced? What is the scope for introducing a law establishing CAs in Thailand? What are the strengths and weaknesses of the proposed legal proposal?* These questions will be examined in chapter 6 (the legal proposal for CA-enabling law provisions for Thailand).
- 6) *What are the key findings of this research? What are its limitations and issues for further study?* These questions will be examined in chapter 7 (conclusions of research findings).

The questions set above will be uncovered by starting from an understanding of the underlying concepts of regulation lying behind the existing laws of Thailand and the comparator jurisdictions. Then, the research will narrow down to the ideas of voluntary agreements, which are a general form of CAs. The findings drawn from these sets of questions will be employed as the basis for understanding and analysing the existing laws in Thailand and the application of CAs in the comparator jurisdictions.

It is to be noted that this research has no intention to radically abolish the existing legal measures regarding land-use control and nature conservation on land and replace them with a new legal proposal, but instead proposes to study the potential in the implementation of CAs to operate as a supplementary tool of those conventional legal measures.²³ The legal proposal this research seeks to develop will become a legal model enabling further study to consider how this legal proposal can be implemented in practice.

This thesis sets the hypothesis for the overarching research question that it is possible to establish a legal model for the creation of CAs to work alongside the existing legal measures. The provisions constituting such a legal framework can be developed by conducting a comparative analysis of the legal features of CA-enabling law implemented in the comparator jurisdictions and formulating the legal proposal for Thailand. However, this thesis by itself cannot make a conclusive recommendation that such a model should be introduced. Further studies, including of the socio-economic and ecological consequences, would be needed to move from a general idea to work out the precise details of a fully worked up proposal and assess its value in specific contexts.

²³ See the justification for this direction of the study in part 3 below.

3. Study scope

The scope of this research can be determined in two aspects, comprising the research methodology proposed to be used and the subject matters to be examined.

Regarding the research methodology, doctrinal analysis, coupled with comparative study, will be used to identify some legal gaps under Thai laws and examine the application of CA-enabling laws in the comparator jurisdictions.²⁴ Based on these legal research techniques, this research focuses the subject matter to be examined in two areas, namely the regulatory dimension and legal dimension, as will be justified below.

Regarding the regulatory dimension, this research will focus the study at the concepts of regulation and available tools for regulation as well as the underlying concepts of voluntary agreements in the early chapters. These two main ideas will be used to shed light on the regulatory background behind the established Thai laws, which have primarily developed from the laws of the western countries, and on the application of CA-enabling laws in the comparator jurisdictions. The examination of regulation is based on academic work from the western perspective, specifically from experience in regulating private actors in the USA and European countries.

Regarding the legal aspect, this thesis will mainly study the application of relevant laws in Thailand to explore the room for the introduction of a new legal tool to support the implementation of the existing ones. The areas to be examined are threefold, comprising the legal concepts of property rights on land, land-use regulation and nature conservation. These three aspects of the law are crucial for this study since they are relevant to the identification of the legal gaps of the existing regime and the opportunities to introduce a new legal tool. Apart from that, this thesis will primarily conduct a comparative study by examining the laws in place in the comparing jurisdictions, namely Australia, the UK and the USA. The justification for this selection and the scope of the laws to be examined will be discussed in section 4.3 below.

This thesis accepts that a wide range of voluntary techniques can be employed to serve a similar aim as the use of CAs. However, due to the limited space of this thesis, it will

²⁴ See the justification for the selections of the research methodology and comparator jurisdictions in sections 4.2 and 4.3 below.

not examine the potential of the introduction of other voluntary and market-based schemes, nor their potential to assist the conservation of natural features on land in Thailand.²⁵

4. Justification for the selections of the legal tools, research methodology and jurisdictions for the study

As mentioned earlier, the primary aim of this study is to develop a proposal for the establishment of CAs in the Thai legal system; this study adopts a legal doctrinal and comparative study to fulfil this task. The justification for the selection of a regulatory tool, research methodology and jurisdictions for the study is explained as follows.

4.1 Justification for the study of voluntary approach and conservation agreements (CAs)

This section justifies why this research proposes to develop a voluntary legal tool to work with the existing legal regime. In the first place, the use of voluntary tools in combination with direct regulation looks desirable to deal with environmental problems rather than the use of stand-alone C&C regulation.²⁶ From a governmental policy side, many pieces of literature argue that the introduction of new land-use regulatory control to restrict activities on land is politically difficult as it directly interferes with the use of property.²⁷ This is the same in Thailand where the national environmental policy, and some scholars, support the enactment of legal measures based on voluntary approaches and economic instruments for the management of natural resources and nature conservation.²⁸

²⁵ See the justification for the selection to study the implementation of CAs in section 4.1 below.

²⁶ See Gunningham, Grabosky and Sinclair (n 2) 15-17; Beckett G Cantley, 'Environmental Preservation and the Fifth Amendment: The Use and Limits of Conservation Easements by Regulatory Taking and Eminent Domain' (2014) 20 Hastings West-Northwest Journal of Environmental Law and Policy 215, 216; Ian Hannam and Ben Boer, *Legal and Institutional Frameworks for Sustainable Soils: A Preliminary Report* (Environmental Policy and Law Paper No 45, IUCN 2002) 43.

²⁷ Cantley (n 26) 102.

²⁸ Boonrueang (n 10) 39; Policy 3 of the Thai National Policy and Plans for the Enhancement and Conservation of National Environmental Quality 2560-2578 BE (2018-2038) (ONEP (n 14) 131-33 (this document obligates relevant governmental bodies to implement a specific action plan, including setting the plan to propose a draft bill, conforming to the National Policy and Plans by virtue of the Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), ss 13 and 35).

Some may argue that the improvement of the existing relevant laws should be more desirable than the introduction of a new legal tool. This includes the enactment of a new statutory provision imposing on landowners duties of conserving biodiversity on their land or requiring a development permit before carrying out any land clearing. However, this thesis maintains that the introduction of a new legal vehicle on a voluntary basis is attractive for two reasons.

In the first place, the use of a voluntary tool is attractive where a government seeks to restrict the exercise of property rights on privately-owned land or require landowners to carry out positive obligations. In some jurisdictions, the use of legal regulation to restrict the use of property is unwelcome. For instance, in the USA, the restriction of the use of land can be subject to the takings clauses under the Constitution, which requires the government to pay just compensation for such restriction.²⁹ For this reason, the introduction of burdens on land with a voluntary tool becomes an alternative choice for governments.³⁰

Another point to be noted is why this thesis sees a CA an appropriate voluntary choice. The merits of CAs can be justified on many grounds.³¹ One among others is that a CA is the most suitable choice that can be used to impose obligations running with the land³² (i.e. automatically binding on successors in title to the landowner who initially entered the agreement) for the conservation of natural features on privately-owned land.³³ The evidence for this justification is apparent from the implementation of this legal tool in several jurisdictions.³⁴ CAs are distinct from a simple contract since this regulatory tool imposes a burden running with the land which binds a land title

²⁹ Jessica Owley, 'The Emergence of Exacted Conservation Easements' (2006) 84 Nebraska Law Review 1043, 1098; Cantley (n 26) 216.

³⁰ See other reasons for the use of voluntary agreements in part 4 of chapter 3.

³¹ For example, Hodge and Adams support the use of CAs as they could be used to support conservation organisations to participate in land use and management in rural land conservation (Ian D Hodge and William M Adams, 'Property Institutions for Rural Land Conservation: Towards a Postneoliberal Agenda' (2014) 36 Journal of Rural Studies 453, 461).

See other merits in part 6 below.

³² The words 'run with the land' is clearly explained by the Victoria Law Reform Commission (Australia) as the situation where 'the benefit and burden of a property right passing to successors in title to land, so that it continues to apply to the new owner or occupier' (Victoria Law Reform Commission, *Easements and Covenants* (Final Report No 22, 2011) 8).

³³ See the examples of the range of voluntary tools that can be used to conserve natural features on land in Sristi Kamal, Małgorzata Grodzińska-Jurczak and Gregory Brown, 'Conservation on Private Land: A Review of Global Strategies with a Proposed Classification System' (2015) 58 Journal of Environmental Planning and Management 576, 581-82; Ian Bowles and others, 'Economic Incentives and Legal Tools for Private Sector Conservation' (1998) 8 Duke Environmental Law & Policy Forum 209, 211-220; Barbara Lausche, *Guidelines for Protected Areas Legislation* (IUCN Environmental Policy and Law Paper No 81, 2011) paras 25 and 55.

³⁴ Kamal, Jurczak and Brown, (n 33); Lausche (n 33) para 247.

successor.³⁵ This legal instrument entails the creation of a new property right on land by agreement of the qualified parties. The examination in section 1.2 of chapter 4 will illustrate how CAs could be used to deal with environmental problems in Thailand.

This thesis does not go so far as to argue that this legal tool is the optimal legal mechanism for dealing with land conservation but sees the attraction and possibilities in developing and establishing this legal vehicle in Thailand. Regarding the experience of other jurisdictions, this legal tool has been used in many jurisdictions for decades,³⁶ and Thailand could learn from those jurisdictions and develop this legal tool in a way compatible with its own legal system.

Regarding the possibility to develop this legal tool based on the legal models of other jurisdictions, although this legal tool has never been used in the country, Thai people are familiar with some private legal tools similar to a CA, including servitudes created by private-law agreements. This implies that there is room to develop this legal tool in the country. Apart from that, a CA is the legal tool that can be used as a basis for supporting other market-based instruments, for instance, biodiversity offsetting.³⁷ The development of this legal tool could invite the use of other mixed tools dealing with environmental challenges in the coming future.

4.2 Justification for the selection of research approach

The approach employed for the examination of the development of the CA framework for Thailand is entirely based on desk-based analysis emphasising two legal techniques. They are doctrinal analysis coupled with comparative analysis of law as will be explained below. Doctrinal legal analysis is essential for this study because it can be used to find the existence of specific legal rules in a particular area and analyse how they can be applied for a specific circumstance.³⁸ This technique helps to identify the application and limitations of the existing laws in Thailand as well as assisting in considering whether the proposed legal provisions for CA establishment can be implemented in the country.

³⁵ See this explanation in the context of management agreements implemented in the UK in Colin T Reid, *Nature Conservation Law* (3rd edn, W Green 2009) para 1.3.17.

³⁶ For example, see the development of the use of CAs in Australia, the UK and USA in part 1 of chapter 5.

³⁷ Reid and Nsoh (n 17) 178.

³⁸ Paul Chynoweth, 'Chapter 3: Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29-30.

A comparative study, alongside a doctrinal analysis of laws, also plays a vital role in determining and analysing critical features for the legal comparison in chapter 5 as well as identifying key strengths and weaknesses of each legal model. This research approach involves the comparison of the differences and similarities of the laws in different jurisdictions.³⁹ Although there might be some unexpected results arising from legal transplants from different social, political and economic contexts,⁴⁰ this thesis argues that a comparative study is suitable for the examination in this topic for two main reasons. First, it enables a researcher to compare the differences in legal models by comparing foreign laws to modernise and improve the law in a different jurisdiction.⁴¹ Second, making use of comparative study is also helpful for the development of a new legal scheme for one jurisdiction by considering the legal structures, features and experience in implementing and enforcing similar legal measures in other jurisdictions. The justification for the selection of the comparators will be addressed below.

4.3 Justification for the selection of comparator jurisdictions

As mentioned in 4.1, CAs have never been used in Thailand, so exploring the concept and design issues needed to develop this tool requires studying where it has been implemented. This research mainly compares and analyses the strengths and weaknesses of key elements of a CA implemented in the CA-enabling laws of three jurisdictions, comprising those of Australia, the UK, and the USA. The primary objective of this comparison is to understand the similarities and differences of CAs in these jurisdictions. It is also helpful for the analysis seeking to extract strengths and weaknesses drawn from these three jurisdictions to develop possible legal elements for Thailand.

³⁹ Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 53-57; Michaels Ralf, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2006) 342.

⁴⁰ Ugo Mattei, 'Chapter 25: Comparative Law and Critical Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 827-833.

⁴¹ Esin Öricü, 'Methodology of Comparative Law' in Jan M Smith (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 450.

Admittedly, those jurisdictions are not the only ones that could be studied,⁴² but there are good reasons for choosing them. In the first place, Australia, the UK and the USA have enacted statutes to implement CAs⁴³ for nature conservation on privately-owned land over a certain period, and some of these jurisdictions are developing, or have recently introduced, a new model of CAs.⁴⁴ This selection enables the research to observe their legal models and consider the challenging issues, as well as limitations of this tool from these three countries. Second, there is a multitude of academic papers in English examining the use of this voluntary tool in these three countries. The sufficiency of academic papers is vital for this comparative study in analysing the use of this tool.

Apart from the above justification, the UK is interesting for this study for many grounds. First, there is substantial work by the Law Commission studying the possibility of one variation of this tool, conservation covenants, in England and Wales.⁴⁵ Their study lays down the limitations of existing laws and explores the possibility of developing conservation covenants in England. Currently, the Environment Bill addressing the provisions of making conservation covenants is in the legislative process.⁴⁶ This means that this thesis can study the work of the Law Commission and the Environment Bill as part of this comparative study. Also, all jurisdictions in the UK have long experience in employing management agreements, as a specific form of CAs, as a subsidiary tool to the formal obligations under the

⁴² Some may suggest that a comparative study with the legal models in place in developing countries might be more desirable because of the similarities of socio-economic conditions. This thesis accepts that the comparison with legal models of developing States looks appealing, but it should be undertaken only where the information to be compared is sufficient. However, the quest for information about the laws relating to CAs in developing States found that although some provide examples of conservation through private law, these do not specifically focus on CAs. The information relating to private land conservation in Costa Rica, for instance, is not in legal documents, but instead policy reports or articles. The difficulty in searching for a primary source (CA-enabling laws) from a reliable source means that the comparison of laws from the jurisdictions without proper access to primary sources might be at risk of comparing laws based on inaccurate or outdated information.

⁴³ CAs in those countries might be called with different names, including conservation covenants, management agreements and conservation burdens in some areas of the UK, conservation easements in the USA, and private land conservation agreements in New South Wales, Australia.

⁴⁴ In the UK, there is an attempt to introduce a legal model of CAs to England; meanwhile, a law on biodiversity conservation in New South Wales, Australia, recently introduced a new and comprehensive legal model of this tool in 2016 and coming into effect in 2017.

⁴⁵ Law Commission, *Conservation Covenants* (Law Com No 349 2014).

⁴⁶ See Environment Bill introduced to the House of Commons on 30 January 2020 (HC Bill 9) at <<https://services.parliament.uk/bills/2019-20/environment.html>> accessed 14 May 2020. This Chapter will use the 'Environment Bill' to refer to the Environment Bill 2019-2020, in which conservation covenant provisions are incorporated. See also DEFRA, 'A Green Future: Our 25 Year Plan to Improve the Environment' (25 Year Environment Plan, OGL 2018) 62.

statutes made to promote for nature conservation.⁴⁷ The implementation of this tool was also influenced by EU law and policy, where incentive mechanisms have been encouraged for good farming practices.⁴⁸ For these reasons, the application of management agreements under specific statutes, for example, under the Natural Environment and Rural Communities Act 2006 in England, will be investigated in this comparative study as representative of the application of CAs in the UK.

The USA is also attractive for several reasons. Firstly, conservation easements - one form of CAs - have been heavily used as a land protection mechanism for more than the past four decades.⁴⁹ The US legal model is also the oldest,⁵⁰ most well-established system of CAs compared with the legal models of other jurisdictions.⁵¹ The success of CA implementation in the USA attracts several people to support the US legal model being applied in other countries.⁵² This means that this research can benefit from the US experience to help develop a legal model for Thailand. Secondly, the USA provides a model law for implementing a CA,⁵³ and each state could adopt and implement the legal model of this tool adjusted for its own legal conditions. The US model law is also appealing since it offers broader options for the legal provisions for state-level implementation.⁵⁴ Thus, there is room to learn the strengths, weaknesses and

⁴⁷ Andrea Ross and Jeremy Rowan-Robinson, 'Behind Closed Doors: The Use of Agreements in the UK to Protect the Environment' (1999) 1 *Environmental Law Review* 82, 88.

⁴⁸ The primary source of policy schemes originates from the Common Agricultural Policy (CAP) introduced in 1962. The CAP has been made legally binding on EU member states by the implementation of various EU Directives (see European Commission, 'The Common Agricultural Policy at a Glance' <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en#legalfoundations> accessed 14 May 2020).

⁴⁹ Federico Cheever and Nancy A McLaughlin, 'An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law' (2015) 1 *Journal of Law, Property, and Society* 107, 109.

⁵⁰ Law Commission (n 45) para 3.31.

⁵¹ The USA provides a very comprehensive and updated database regarding the use of conservation easements, one of the form of CAs, nationwide (NCED, 'National Conservation Easement Database' <www.conservationeasement.us/> accessed 14 May 2020).

⁵² Gerald Korngold, 'Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection' (2011) 25 *Wisconsin International Law Journal* 585, 588.

⁵³ See the Uniform Conservation Easement Act (UCEA) in Uniform Law Commission, 'Conservation Easement Act' <www.uniformlaws.org/viewdocument/final-act-with-comments-16?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd&tab=librarydocuments> accessed 14 May 2020.

⁵⁴ For example, the US model law divides the possible objectives of CAs that each state can adopt into five groups. They include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property (UCEA, s 1(1)).

limitations in the implementation of this tool from the experience of various states in the USA.⁵⁵

The models of CA-enabling laws in Australia are attractive as CAs are endorsed in both the federal and state-level legislation. This research will focus the examination on the CA-enabling laws at both levels, specifically CAs in New South Wales (NSW) and Western Australia (WA). They are worth examining as they have recently introduced several pieces of nature conservation-related legislation to replace those that have been in operation for a long time.⁵⁶ This makes NSW and WA examples of the jurisdictions introducing CAs for particular purposes in the conservation of natural features (biodiversity). Also, the NSW regime provides particularly detailed and established public agencies for administering CAs concluded between eligible landowners and the NSW government. WA is attractive as a representative of a jurisdiction providing concise provisions when compared with those of NSW, as well as having some interesting legal features.⁵⁷ Additionally, environmental policies in Australia, both of the Commonwealth and States or Territories, embrace the use of voluntary legal tools coupled with direct regulation for biodiversity conservation.⁵⁸ Hence, this research could learn not only how Australia created the legal model of CAs, but also study how the varied experience across this country has led to NSW establishing its own version of this tool for biodiversity conservation.⁵⁹

Another point that should be addressed here is about the reason in excluding the choice of comparing with civil law countries. As will be articulated in chapter 4, the Thai

⁵⁵ This study has no intention to study CA-related laws of all states in the USA. It intends to select some outstanding legal issues of CA-related laws from different states, where those examples can help reflect the strengths and weaknesses of the American model.

⁵⁶ Two pieces of legislation were enacted in these two states, namely the Biodiversity Conservation Act 2016 (NSW) and Biodiversity Conservation Act 2016 (WA).

⁵⁷ For example, the CA-enabling law of WA is the only one imposing a criminal penalty for the breach of CA obligations.

⁵⁸ This can be seen from the attempt to set the Principle of Ecologically Sustainable Development (ESD) as a policy goal in 1991, the enactment of the Environmental Protection and Biodiversity Conservation Act 1999 (EPBCA 1999) of the Federal Government and the introduction of the law on biodiversity conservation in many states and territories (see Godden, Peel and McDonald (n 17) 60-64; Eloise Scottford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 103).

⁵⁹ As mentioned, the NSW and WA models are the latest CA models which has been recognised by legislation. This means that the CA models of these states can be expected to reflect lessons learnt from their own previous legal models as well as from those of other states or territories. Hence, this research expects that the CA-enabling laws of these states would be the interesting ones for this comparative study.

legal system is civil-law based,⁶⁰ and it might be questioned why the legal models of civil law countries are not chosen for this comparison. The justifications for this are twofold. The first reason is that the origins and development of CAs lie in the common law countries, specifically those jurisdictions identified above. Although some civil-law based countries recently adopted a CA as a legal tool for land conservation, lack of experience in implementing CA-enabling law could hinder Thailand to develop a proposed model from these countries.⁶¹ France, for example, recently introduced a CA as a conservation technique in 2016 under the label ‘environmental real obligation’ (*obligation réelles environnementales*) as part of the Biodiversity Act 2016.⁶² The second reason is the nature of the objects to be compared. Although the traditional rules under the common law system have been formulated and employed a case-law system, the primary source of its modern environmental laws in common law countries is a statutory source,⁶³ and the objects to be compared are statutory provisions.⁶⁴ For this reason, the comparative study of CA-enabling laws of the common law-based jurisdictions to develop the legal proposal for the civil law-based jurisdiction may not be problematic as CAs in those jurisdictions are created to fulfil the same function.⁶⁵

⁶⁰ As observed by Pongsapan, the promulgation of the Thai Civil and Commercial Code 1925 was entirely drafted based on English translation of foreign laws, specifically the German Civil Code (Munin Pongsapan, ‘Remedies for Breach of Contract in Thai Law’ in Mindy Chen-Wishart, Alexander Loke, and Burton Ong (eds), *Studies in the Contract Laws of Asia: Remedies for Breach of Contract* (OUP 2016) 371).

⁶¹ See the recent study about the possibility to introduce a CA in European countries in Inga Racinska and Siim Vahtrus, ‘The Use of Conservation Easements in the European Union’ (Report to NABU Federal Association 2018).

⁶² Chapter II of Title III of Book I of the Environment Code Article L. 132-3.

See also Julie Babin, ‘Real Environmental Obligations (ORE): Where are we now?’

<www.accesstoland.eu/IMG/pdf/ore_fncen__tdl_en-2.pdf> accessed 14 May 2020.

⁶³ Bates (n 7) para 2.48.

In the UK, the definition of environmental law in the Environment Bill, which refers to any legislative provisions mainly concerned with ‘environmental matters’, indicates that a statutory provision is a primary source of environmental law. See the meaning of environmental law in the Environment Bill, cl 40.

⁶⁴ Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017) 23.

⁶⁵ As will be seen in chapters 4 and 5 regarding the legal principles relevant to the creation of CAs, although developed from different legal systems (common-law and civil-law systems) the majority of the legal mechanisms regarding the creation of property rights on land, land-use regulation and nature conservation of Thailand and the comparator jurisdictions are similar, except for the legal concepts of covenants and land tenures (ownership). Hence, this thesis sees that there is no significant difference that makes this comparative study and legal transplantation impossible. This study considers the differences in the legal mechanisms, concepts and socio-economic diversity among the comparators countries and Thailand a little challenging for the design choices rather than an obstacle in conducting a comparative study.

5. Research originality and contributions

This research will generate three original contributions, viz. contributions to an analysis of theoretical aspects of a voluntary approach for nature conservation in Thailand, to a comparative study of CA-related laws implemented in the compared countries and to the reform of land-use and biodiversity conservation laws in Thailand.

Regarding the contribution to an analysis of theoretical aspects of a voluntary approach in Thailand, although CAs are far from new in the western world, and there are plenty of papers examining voluntary agreements and CAs, only a handful of papers analyse the theoretical aspect and application of CAs comprehensively.⁶⁶ This study will generate conclusions on how CAs and general voluntary agreements are similar or different from one another. Then, this thesis will use this finding for an analysis of how CAs can work alongside C&C-based instruments where they are developed for the implementation in Thailand.

Regarding the merit of a comparative study of the legal models of the compared countries, although some work has already investigated the application of CAs in some respects,⁶⁷ the recent legislative reform in some comparator jurisdictions⁶⁸ has brought changes worthy of re-examination. This research will create new comprehensive work comparing the features, strengths and weaknesses of CAs used in the UK, USA and Australia. This outcome will provide an example to other research or academic papers seeking to develop CA models for other countries.

Additionally, the outcome of this study will help to point towards which legal provisions the policy- or law-makers should consider for the development of a CA legal model in the case that the establishment of CAs is possible. The conclusion drawn from this research study will also provide a new knowledge body for Thai academics and policy-makers regarding the use of a combined regulatory approach (between

⁶⁶ For example, the work of Colin T Reid and Walters Nsoh, namely 'The Privatisation of Biodiversity? New Approaches to Conservation Law', studied the features and examples of the application of this tool in various jurisdictions (see Reid and Nsoh (n 17)). However, as their study aims at illustrating how CAs could take part as a new legal approach for biodiversity conservation and suggesting how law-makers should design this tool, this book does not exhaustively explore a theoretical concept of regulation and suggest how to make this tool compatible with the mainstream C&C regulation. Also, that study leaves room enabling this research to examine further the implementation of this voluntary tool in a specific country.

⁶⁷ For example, the work of Professor Colin T Reid and Walters Nsoh (Reid and Nsoh (n 17)) and the Law Commission (Law Commission (n 45)).

⁶⁸ For example, in NSW and WA of Australia and in England.

C&C and voluntary approaches) from a perspective of land-use regulation and biodiversity conservation.

6. Conservation agreements at a glance

As this thesis primarily entails the examination of CAs, it is essential to consider at the beginning what a CA is, and how it functions.⁶⁹ One of the reasons for this overview is that although far from new,⁷⁰ CAs remain unknown in many quarters. The investigation of what this legal tool looks like and how it works should be preliminarily explained to enable a reader to understand how each chapter is linked to the development of this legal instrument.

Although there is no well-accepted definition of CAs due to the differences in their terms, legal development and functions,⁷¹ it is necessary to set the scene here by identifying what this thesis perceives as the common features of this legal tool. One of the definitions widely cited by several scholars⁷² is the definition given by the Law Commission of England and Wales seeking to develop a legal framework of conservation covenants⁷³ for implementation in England and Wales. The Law Commission defines conservation covenants as follows;

*'A conservation covenant is an agreement made between a landowner and a conservation body which ensures the conservation of natural or heritage features on the land. It is a private and voluntary arrangement made in the public interest, which continues to be effective even after the land changes hands'.*⁷⁴

⁶⁹ See the full examination about the application of this legal tool in chapter 5.

⁷⁰ Reid and Nsoh (n 17) 201.

⁷¹ See the differences on these matters in parts 1 and 2 of chapter 5.

⁷² Examples of the academic work employing the Law Commission's definition can be observed from Reid and Nsoh (n 17) 179; Bonnie Holligan, 'Narratives of Capital versus Narratives of Community: Conservation Covenants and the Private Regulation of Land Use' (2018) 30 *Journal of Environmental Law* 55, 57; Christopher Rodgers, 'Towards a Taxonomy for Public and Common Property' (2019) 78 *Cambridge Law Journal* 124, 141-42; Judith-Anne MacKenzie and Mary Phillips, *Textbook on Land Law* (15th edn, OUP 2014) 581.

⁷³ 'Conservation covenant' is one of various terms equivalent to 'conservation agreement (CA)' employed in this thesis.

⁷⁴ Law Commission (n 45) para. 1.1.

The word ‘agreement’ indicates a voluntary basis⁷⁵ itself, which means that the conservation duties emerge from voluntary agreement rather than legal regulation.⁷⁶ The parties to this type of agreement commonly are landowners⁷⁷ and qualified conservation bodies.⁷⁸ CAs are different from other types of voluntary environmental agreements in that they are commonly created to serve a specific aim for the conservation of specified features on land. The definition above also emphasises its noticeable character as a private law instrument seeking to achieve public interest.⁷⁹ CAs impose either positive or negative obligations on landowners to prohibit them doing certain activities on land or require them to do affirmative actions thereon. The obligations may include the commitment not to change land-use patterns, e.g. from woodland to residential areas, or to plant and maintain native vegetation on the land. Additionally, CAs are distinguished from a private contract created to serve a similar purpose in that they impose burdens running with the land, and such burdens bind future landowners. CAs can be created to last in perpetuity to ensure long-term conservation.⁸⁰

As will be seen in sub-section 2.1.3 of chapter 4 and section 1.2 of chapter 6, although some private law instruments are in place in Thailand and can create obligations on landowners to do certain tasks, they have some limitations. These include limitations in creating a positive obligation to run with the land in perpetuity. The presence of this

⁷⁵ The word ‘voluntary’ is one of the most controversial terms as there are different views on to what extent the level of intention constituting ‘voluntary agreement’ should be. In the context of CA, some consider that CAs are created voluntarily irrespective whether they are imposed by regulation so long as landowners have a choice to decide whether to enter into a CA or not. Another might oppose that the nature of an agreement is reliant on the free will of the parties, and the word ‘voluntary’ should mean that an agreement is created with no threat of regulation. Hence, CAs created by the fear that an individual will be prosecuted or not be granted permission for their action should be treated as an involuntary agreement (see the different views in Jerold S Kayden, ‘Zoning for Dollars: New Rules for an Old Game? Comments on the *Municipal Art Society* and *Nollan Cases*’ (1991) 39 *Journal of Urban and Contemporary Law* 3, 35-36; and Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985) 4).

⁷⁶ Reid and Nsoh (n 17) 178.

⁷⁷ Although landowners play a primary role in entering into CAs with qualified holder, some CA-enabling laws also entitle other persons, for instance, a land tenant, to do the same task. This point will be examined and discussed in part 5 of chapter 5.

⁷⁸ See the points of who can be the qualified conservation body (qualified holders) and who can enter into a CA with the qualified bodies in parts 4 and 5 of chapter 5.

⁷⁹ Reid and Nsoh (n 17) 178.

However, as argued by Holligan, the nature of CAs as a private-law instrument engenders some concerns. These include the question of whether and to what extent CAs can be used to deliver the public environmental and social benefits and provide environmental justice (Holligan (n 72) 56 and 80).

⁸⁰ See the considerations enabling CAs to run with the land in parts 7, 8, 9 and 11 of chapter 5.

limitation in the Thai legal system emphasises the need to develop a new legal tool which can fulfil this task in the public interest, and CAs can do this task.

Apart from the key features explained above, some other features can be added on to enable CAs to be implemented efficiently. For instance, landowners may receive a certain type of financial incentive in exchange for the agreement being under CA burdens.⁸¹ CAs can be used to serve several roles, including for the protection or conservation of an area with significant conservation value;⁸² for the establishment of private protected areas;⁸³ and as a legal basis for delivering other innovative schemes, e.g. biodiversity offsetting or payments for ecosystem services.⁸⁴

7. Research outline

This thesis is divided into seven chapters, which include this introductory chapter explaining the research background, research questions, and the justification for the research approach and scope of this study as well as mapping the outline for the following chapters.

Chapter 2, entails an explanation and summary of the theoretical concepts of tools for environmental regulation. This chapter will support the underlying ideas behind the legal measures of the existing regime of the Thai laws and explores the range of available regulatory tools that can be used to deal with environmental problems in a broad aspect. The notions examined in this chapter also demonstrate how the existing legal tools examined in chapters 4 and 5 operate, and how a new voluntary tool (CA) may interact with the conventional direct regulation already established.

Similarly, chapter 3, entitled ‘fundamental concepts and ideas of voluntary environmental agreements’, will explain the fundamental concept of voluntary agreements and their potential as a tool for environmental regulation. It will examine

⁸¹ Sayed Iftkhar, John Tisdell and Louise Gilfedder, ‘Privately-owned Lands for Biodiversity Conservation: Review of Conservation Covenanting Programs in Tasmania, Australia’ (2014) 169 *Biological Conservation* 176.

⁸² Department of Environment, Climate Change and Water NSW (DECCW), ‘Conservation Partnerships: A Guide for Landholders’ (NSW 2010) 9.

⁸³ Mathew J Hardy and others, ‘Exploring the Permanence of Conservation Covenants’ (2017) 10 *Conservation Letters* 221.

⁸⁴ Colin T Reid, ‘Employing Property Rights for Nature Conservation’ in Christine Godt (ed), *Regulatory Property Rights: The Transforming of Notion of Property in Transnational Business Regulation* (Brill Academic Publishers 2016) 176; Law Commission, *Conservation Covenants: A Consultation Paper* (Law Com CP No 211, 2013) paras 2.17-2.30.

the origin and purposes of implementing this regulatory technique to deal with environmental matters in various aspects. This chapter will help to develop an understanding of a wide range of choice of voluntary instruments and explain their strengths and weaknesses. Above all, the investigation in those points will help this thesis set the scene from a theoretical perspective on how a CA, a voluntary environmental agreement primarily used for the conservation purposes of features on land, can be viewed from a regulatory perspective.⁸⁵

Chapter 4, entitled ‘land rights, land-use regulation and nature conservation in Thailand’ acts as a background chapter enabling this thesis to set the scene for a default legal regime in Thailand. It will explain what the factual issues are in relation to environmental problems caused by activities on land. This is crucial in identifying what specific issues should be tackled by a new proposed legal framework. Then, a summary of the existing relevant legal measures, including the regime of the property rights on land and land-use control, will be provided. This chapter will become a backdrop in determining in chapter 6 what limitations of the existing regime trigger the introduction of a new statutory framework.

Chapter 5 is the central part of this study, mainly examining the implementation of CA-enabling laws in the comparator jurisdictions. The main points to be examined are divided into thirteen parts; for instance, the purposes for which a CA can be created and the actors eligible to enter into this type of agreement. This chapter will examine the standard features of CAs, and the differences and similarities on each specific matter under the selected law in each jurisdiction. Then this thesis will examine the strengths, weaknesses and legal implications of those relevant matters. This examination aims to gain information helpful for the development of the proposal for Thailand in chapter 6.

After the comparative analysis has been made, chapter 6 will primarily analyse possible CA-enabling law provisions for Thailand. This chapter will be in three specific parts. The first part will justify the opportunity for introducing new statutory provisions to fill such limitations. Then it will establish the limitations of the existing regime in creating the obligation on landowners to conserve natural features on land.

⁸⁵ The reason why this thesis considers the application of VEAs from a theoretical perspective stems from the fact that while there is a handful of academic papers examining CAs from a regulatory perspective, there are a myriad pieces of work studying how VEAs operate by considering from regulatory perspective.

The second part will develop the possible legal provisions compatible with the existing regime. The last one will identify the overall strengths and weaknesses of the legal proposal developed in part 2.

Chapter 7 will summarise the research findings examined in chapters 1 to 6 and illustrate how they are linked together and answer the overarching research question. As this thesis does not claim to present a complete study ready for the implementation in practice, this chapter will also identify what its limitations are. After that, it will suggest what can be the potential for future research.

Chapter 2 Regulation: fundamental concepts and available tools for environmental regulation

Introduction

One of the mainstays of the law entails the use of legal coercion to intervene in human activities.⁸⁶ The prohibition on clearing native vegetation is illustrative the attempts to use a certain level of legal coercion to influence human activities. This chapter acts as a theoretical background highlighting some points interrelated to the understanding of how the legal measures being examined in the later chapters, specifically chapters 4 and 5, are viewed from a regulatory perspective. The main task of this chapter is to examine two questions set as the sub-research questions in chapter 1. The first examines ‘what are the relevant fundamental concepts and tools for environmental regulation?’ And the second which is developed from the first will consider ‘how are they relevant to the understanding of the existing rules of land-use control and nature conservation on land in Thailand and the comparator jurisdictions?’

This thesis argues that the examination of these questions is crucial in helping understand why the law is used to regulate a particular activity and which regulatory option is suitable to be implemented for such an activity. Understanding these points is fundamental to the development of a new legal tool to work alongside the established ones.

This chapter is divided into two parts, starting from the summarisation of the theoretical concepts of regulation. The second part illustrates available tools and techniques for regulation, specifically, those relating to environmental regulation.⁸⁷

These two parts will help this thesis justify how the theoretical concepts of environmental regulation are related to the application of laws in Thailand and comparator jurisdictions, as well as providing a backdrop to the voluntary environmental agreements to be examined in chapter 3.

⁸⁶ Ekow N Yankah, ‘The Force of Law: The Role of Coercion in Legal Norms’ (2008) 42 University of Richmond Law Review 1195, 1196 and 1209.

⁸⁷ Environmental regulation is used in this thesis to refer to intervention in activities for the management of environmental-related issues, for example, to deal with climate change, to eradicate air pollution or to conserve biodiversity.

It is important to note that this chapter is not an exhaustive study of the concepts of regulation, but rather illustrates how the concepts of regulation are interconnected with the legal measures to be examined in the following chapters. Thus, those not relevant to the understanding of such an interconnection are excluded from the examination in this chapter.

1. Theoretical concepts of regulation

The understanding of the theoretical concepts of regulation in this part mainly examines the questions of what the term ‘regulation’ in this thesis means; what the aim of regulation is; and what the range of reasons for regulation can be.

1.1 Meaning and scope of regulation

The definition and scope of the term ‘regulation’ are concepts that remain unsettled and unclear.⁸⁸ The use of the term ‘regulation’ in different contexts, disciplines or purposes is the reason for such uncertainty.⁸⁹ This thesis considers regulation in two respects. In the first place, regulation can be regarded from its nature as the control of, intervention in or influence over human behaviour.⁹⁰ Such control, intervention or influence may entail the use of a set of rules or standards⁹¹ to alter human behaviour to achieve specific purposes or outcomes.⁹² The use of a criminal offence to punish a person failing to separate household waste exemplifies regulation by a state to intervene in waste management.

⁸⁸ Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) 238.

Kotzé argues that ‘regulation’ and ‘governance’ can be used as interchangeable terms, and the latter is the fashionable one being used in the context of environmental governance (Louis J Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012) 82-83).

⁸⁹ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials (Law in Context)* (CUP 2007) 3-4; Yves Dezalay, ‘Between the State, Law, and the Market: the Social and Professional Stakes in the Construction and Definition of a Regulatory Arena’ in William Bratton and others (eds), *International Regulatory Competition and Coordination* (OUP 1996) 59-60.

⁹⁰ Arie Freiberg, ‘Re-stocking the Regulatory Tool-kit’ (Regulation in an Age of Crisis Conference, Dublin, June 2010) 22.

⁹¹ A standard is a form of uniform requirement on a category of activity to achieve a specific regulatory goal (Gunningham, Grabosky and Sinclair (n 2) 41; Christopher Hood, Henry Rothstein, and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2001) 23).

⁹² Jessop Bob, ‘Regulation Theories in Retrospect and Prospect’ (1990) 19 *Economy and Society* 153, 216.

Another way to characterise the word ‘regulation’ is to consider whether it is backed by legal coercion or not. Regulation can be either a means of intervention in behaviour backed by the law or running without legal coercion.⁹³ The first view sees regulation in a narrow sense, which is closely related to law. It generally provides the standard of conduct backed by legal pressure.⁹⁴ Governments can promulgate requirements to direct people to do a particular thing or impose a duty to prevent undesired outcomes.⁹⁵ For instance, the law may require factories to conduct wastewater treatment before discharge. The latter view, on the other hand, sees regulation with a broader meaning, which includes all forms of social control seeking to intervene in human activities regardless of who are the regulators⁹⁶ and whether the power is conferred by the law or not.⁹⁷ It can be seen as including written laws, non-binding rules or other kinds of social norms.⁹⁸

As observed above, the scope and meanings of regulation are varied, and the study would be unclear without introducing the meaning of this word proposed for use in this study. Although this chapter will illustrate a wide range of forms of a social intervention seeking to intervene in human activities, the regulatory tools focused in the latter chapters will mainly involve those created by legal authorisation (legal tools). This is because the central issue of the study relates to the examination of the existing laws in Thailand and the comparator jurisdictions to develop the legal options to conserve features on land.

1.2 Aim of regulation

There have been theoretical discussions of whose interests are served by regulation.⁹⁹ For instance, the question might be that ‘whose interests are served where governments collect a sugar tax on soft drinks from its manufacturers?’¹⁰⁰ There are a number of

⁹³ Morgan and Yeung (n 89) 3-4.

⁹⁴ *ibid* 3.

⁹⁵ Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2012) 2; Chris Hilson, *Regulating Pollution* (Hart Publishing 2000) 1.

⁹⁶ ‘Regulator’ in this thesis refers to a player who implements and enforces a set of standards or rules against those who are regulated (regulatees).

⁹⁷ Morgan and Yeung (n 89) 3-4.

⁹⁸ Stuart Bell and others, *Environmental Law* (9th edn, OUP 2017) 222.

⁹⁹ Anthony Ogus, *Regulation: Legal Form and Economic Theory* (OUP 1994) 3-4.

¹⁰⁰ The collection of a sugar tax can be seen in the case of the UK government, who has collected this type of tax intending to tackle childhood obesity. See the information and questions for this tax levy in the UK Government, ‘Soft Drinks Industry Levy Comes into Effect’

different regulatory theories explaining this point. This chapter examines two of these based on interest-based accounts.¹⁰¹ The first notion views regulation as an intervention for the public interest (public interest theories) and the second considers regulation as serving non-public interests (group interest theories and private interest theories).

Public interest theories argue that regulation is the means to tackle market imperfections,¹⁰² and the aim of regulation is to achieve specific results for the benefit of the public. Hence, legal regimes designed by governments are expected to serve the interest of everyone.¹⁰³ Morgan and Yeung observe that this group of theories guides legislators to design and implement the law to achieve the public interest.¹⁰⁴ Numerous provisions found in domestic laws can support this notion, for instance, criminal offences against homicide and theft are designed to protect society's peacefulness.

Nevertheless, some scholars disagree with the previous view and believe that regulation is truly based on the interests of a benefitting group.¹⁰⁵ They argue that the purpose of regulation is not for achieving public interests, but it is for allocating benefits among particular interest groups.¹⁰⁶ Regulation is a result of the compromise between different groups on a specific issue. Some others argue for private interest theories. This approach points out that the development of regulation is a response to private interests rather than those of the public, for instance, to serve the benefit of business groups. Persons who stand to gain or to lose from the implementation of a certain social intervention usually participate in regulation-making processes to protect and maximise their profits.¹⁰⁷ The evidence supporting this notion is that there are some circumstances where a regulator runs the rule for the benefit of particular firms or individuals rather than to serve public benefits. For instance, rules and regulation

<www.gov.uk/government/news/soft-drinks-industry-levy-comes-into-effect> accessed 14 May 2020; Jacqui Thornton, 'The UK Has Introduced a Sugar Tax, but Will it Work?'

<www.lshtm.ac.uk/research/research-action/features/uk-sugar-tax-will-it-work> accessed 14 May 2020.

¹⁰¹ Baldwin, Cave, and Lodge (n 95) 40.

¹⁰² Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (OUP 1998) 9.

¹⁰³ Barry Mitnick, *The Political Economy of Regulation* (Columbia University Press 1980) 91.

¹⁰⁴ Morgan and Yeung (n 89) 17-18 and 42.

¹⁰⁵ George Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3.

¹⁰⁶ John Francis, *The Politics of Regulation: A Comparative Perspective (Comparative Politics)* (Wiley-Blackwell 1993) 8.

¹⁰⁷ Baldwin, Cave, and Lodge (n 95) 21-23.

governing stock markets mainly aim to facilitate business persons investing in the stock exchange rather than to serve for the benefit of all.

Many academic works observe that those theories have both strengths and weaknesses, and relying on a single concept of regulation may not be useful.¹⁰⁸ This chapter will not examine in-depth which one outweighs another. Nonetheless, it is desirable for regulation to seek to achieve benefits for all. Hence, the enactment of law authorising the creation of a conservation agreement to conserve some features on the land should consider whether and to what extent the implementation of CA-enabling law should serve the benefit of all.¹⁰⁹ In practice, of course, there is a tension between different views of what is in the public interest (e.g. economic development versus environmental protection) and between different private interests, and the CA-enabling laws examined in chapter 5 try to balance these.¹¹⁰

1.3 Reasons for regulation

Regardless of whether regulation seeks to serve the public or private interest, some reasons remain a ground for behavioural intervention. This section examines the reasons for regulation in three aspects based on economic, social and environmental grounds. Such grounds may exist in combination to justify a single regulatory scheme.¹¹¹ For example, if a government bans the import of specific agricultural products, the rationale of this policy might be varied. They might include the needs to prevent the decrease in the prices of goods produced domestically (economic ground) as well as to enable the continuation of viable agricultural employment in rural areas (social stability ground).

1.3.1 Economic grounds

One of the vital reasons for regulation arises from an economic ground. Several academic writings maintain that market failure¹¹² is one, among other reasons,

¹⁰⁸ *ibid* 21-23.

¹⁰⁹ Morgan and Yeung (n 89) 17-8, 42 and 75-76.

See the discussion in this point in part 2 of chapter 5 and section 2.2 of chapter 6.

¹¹⁰ See sub-section 11.4.2 of chapter 5.

¹¹¹ Bell and others (n 98) 226.

¹¹² In brief, market failure is the situation where the free market cannot work properly and causes negative results due to the inability to reflect full social costs or benefits of goods or services (see Richard O Zerby and Howard E McCurdy, 'The Failure of Market Failure' (1999) 18 *Journal of Policy*

constituting economic justification for regulation.¹¹³ The examples of circumstances engendering this failure include information deficits, negative externalities, and free-riders, as summarised below.¹¹⁴

Information deficit takes place in many instances,¹¹⁵ including the situation where the producer has more relevant information than the consumer, and this makes the consumer unable to make a reasonable decision about the quality of goods or services.¹¹⁶ Hence, intervention by improving information flow should be made.¹¹⁷ In the arena of environmental regulation, information deficits may arise where a regulator has insufficient information regarding activities to be regulated, but the persons who are about to be regulated do.¹¹⁸ This could lead to mismanagement in selecting a means of regulation. Assume that a government seeks to encourage the conservation of natural heritage on privately-owned land in a particular local area, but has insufficient information about the features in place on a particular piece of land. Thus, the government may impose a prohibition not to clear the land to conserve native wildlife on that area despite that fact that there is no native vegetation thereon.

Negative externalities or spillovers are another economic rationale for regulation. This type of market imperfection may arise where a person who produces goods or services does not bear all the costs from a production process or those expected to arise from goods or services. This leaves some adverse effects, e.g. pollution costs, distributed to others, such as the public. This constitutes a negative externality where the public or other persons bear the cost.¹¹⁹ In Thailand, environmental impacts resulting from rice monoculture, for instance, the extraction of water resource from rivers and biodiversity loss from planting rice across a vast area, can be regarded as an externality. Regulation to internalise these costs is essential as it re-allocates externalities to producers or consumers, not to third parties or society.¹²⁰ The use of chemical fertilisers can be

Analysis and Management 558, 559; Brian J Preston, 'The Judicial Development of Ecologically Sustainable Development' in Fisher (n 6) 509).

¹¹³ Freiberg (n 90) 7.

¹¹⁴ The causes of market failure being summarised below are those relevant to the regulation of land use and conservation of features on land.

¹¹⁵ Baldwin, Cave, and Lodge (n 95) 18; Stephen Breyer, *Regulation and Its Reform* (Harvard University Press 1982) 26-28.

¹¹⁶ Ogus (n 99) 121-123.

¹¹⁷ *ibid* 51 and 121.

¹¹⁸ Cary Coglianese, Richard Zeckhauser, and Edward Parson, 'Securing Truth for Power: Informational Strategy and Regulatory Policy Making' (2004) 89 Minnesota Law Review 277, 278-280.

¹¹⁹ *ibid* 23.

¹²⁰ Baldwin, Cave, and Lodge (n 95) 12.

regarded as a negative externality where the fertilisers are carried by surface run-off into rivers contributing to water pollution.¹²¹

Another situation constituting market failure is where there is a free-rider taking advantages from public goods.¹²² Public goods generally refer to resources or services the consumption of which can be shared by everyone.¹²³ They are non-excludable and non-rivalrous in nature.¹²⁴ Hence, one cannot exclude others, even if they fail to pay for utilising such resources or services, from accessing and using or enjoying them, as it is impossible or too expensive to do so. Examples of public goods are freshwater in rivers, air and public order. The existence of unregulated public goods is flawed in the sense that someone capable of accessing and exploiting such resources might take advantage by utilising them and then others may be unable to use those resources properly as they become scarce. Therefore, regulation is necessary to allocate access to and utilisation of such goods.

It should be noted that the above grounds for regulation are mere examples of market failure, and other justifications can also be classified as falling within the general category of market failure.¹²⁵

1.3.2 Social grounds

Apart from the economic grounds examined above, some scholars argue that regulation can be justified on other grounds, including social-related reasons.¹²⁶ Social grounds for regulation are defined here as the grounds for intervention aiming at justifying fairness or justice to society. This thesis summarises the regulation based on social grounds in three illustrations, namely distributive justice, paternalism and community value.

The rationale for distributive justice is the first ground being summarised here. It is essential in filling the regulatory gap where a proper free-market system is insufficient to serve the basic needs of all in society. Consequently, governments may see it as

¹²¹ The dissolving of nitrates in chemical fertilisers can cause water pollution, called 'eutrophication'. See the explanation of eutrophication in sub-section 1.2.1 of chapter 4.

¹²² Johan den Hertog, 'General Theories of Regulation' in *Encyclopaedia of Law & Economics - 5000 General Theories of Regulation* (Edward Elgar 1996) 230.

¹²³ Ogus (n 99) 33.

¹²⁴ *ibid.*

¹²⁵ Other situations regarded as market failure include windfall profits and monopoly. See also Christopher D Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (Blackwell 1992) ch 6; Breyer (n 115) 22.

¹²⁶ Tony Prosser, 'Regulation and Social Solidarity' (2006) 33 *Journal of Law and Society* 364, 366.

legitimate to regulate certain actions when unfairness arises in society.¹²⁷ For instance, if the income gap between the wealthy and the poor remains high, governments may allow the poor to access affordable medical care for treatment when they are ill. This notion is justifiable as it appears that the free market systems may occasionally fail to allocate fairness for all.

Paternalistic grounds for regulation, on the other hand, entail the intervention by governments to protect welfare, good, happiness, needs, interests or values from harm by restraining firms or individuals from doing some activities.¹²⁸ The word ‘paternalism’ indicates its very nature of the regulation of individuals similar to parents who take care of their children. An example of social rationale backed by this reason is the requirement by the law obliging vehicle passengers to fasten a seatbelt in order to protect them if an accident takes place. Ogus observes that paternalism is different from other behavioural controls for safeguarding social peace in the sense that it aims to protect the safety of a person who is regulated rather than to do so for others in society.¹²⁹

Regarding social solidarity, some scholars argue that social grounds for regulation might originate from the intention to protect communities as a whole¹³⁰ or to secure inclusiveness in particular society.¹³¹ In this sense, the law as a tool for regulation can be created to restrict human activities to manage harm and safety for everyone living in a society¹³² or encourage activities that help make social solidarity. For example, governments may require all working people to pay tax for maintaining public parks in the areas where those persons live. Also, regulation can be implemented to serve the interest for the next generation or for the benefit of society that has yet to come,¹³³ even if there is no primary benefit for a current generation.

The use of land in Thailand and other jurisdictions could be regulated on social grounds as explained above in many ways. These include the potential for

¹²⁷ Ogus (n 99) 46-47.

¹²⁸ Gerald Dworkin, ‘Paternalism’ in R Wasserstrom (Ed), *Morality and the Law* (Wadsworth Pub Co 1971) 181.

¹²⁹ Ogus (n 99) 51-52.

¹³⁰ Richard B Stewart, ‘Regulation in a Liberal State: The Role of Non-Commodity Values’ (1983) 92 Yale Law Journal 1537, 1555-1590.

¹³¹ Tony Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (OUP 2010) 15.

¹³² Prosser (n 126) 383; Rob White, *Crime Against Nature: Environmental Criminology and Ecological Justice* (Willann Publishing 2008) 210.

¹³³ Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd edn, OUP 2014) 96-110.

governments to grant the right to farm on publicly-owned land to poor farmers to eliminate inequality, but also requiring them to plant various native trees. This example could illustrate regulation on the basis of distributive justice for the poor while conserving land for the common benefit of their communities.

1.3.3 Environmental grounds

Although most scholars have highlighted economic and social grounds as the underlying rationales for regulation, it could be argued here that an environmental rationale for regulation also exists. Some may see environmental grounds for regulation as unnecessary since the economic and social rationales for regulation are in place and seem to be sufficient to protect the environment.¹³⁴ Others may argue that economic grounds may be unable to explain regulation in certain circumstances. Non-economic reasons, for instance, the protection of the intrinsic value of an ecological system should be regarded as a justification for regulation.¹³⁵ As observed by Gillespie, the grounds for regulation might relate to environmental protection for the sake of humans' interests. From this perspective, a regulator may regulate human activities for protecting the natural environment as it provides enormous direct and indirect benefits to humans. Regarding direct benefits, governments may impose particular legal duties on individuals to protect nature because it is the source of food, shelter, clothes and medicines. An example of the existence of this factor is the law prohibiting deforestation,¹³⁶ one of the major environmental problems in Thailand. Also, regulation may arise to protect intangible benefits in the form of aesthetic benefits from nature. It is evident that some legislation was introduced to intervene in human activities to maintain nature because beautiful things should be conserved, not destroyed by humans.¹³⁷ Environmental justification can be backed by principles developed and accepted internationally. For instance, direct regulation in the UK has been influenced by the Polluter-Pays and the Precautionary Principles.¹³⁸

¹³⁴ For example, two economic grounds for regulation, e.g. market failure arising from free-riding and negative-externality issues, are the reasons supporting the enactment of environmental law relating to pollution control (Richard Macrory, 'Regulating in a Risky Environment' (2001) 54 *Current Legal Problems* 619, 621).

¹³⁵ Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Hart 2005) 4.

¹³⁶ Gillespie (n 133) 25.

¹³⁷ *ibid* 81.

¹³⁸ Mark Stallworthy, *Understanding Environmental Law* (Sweet & Maxwell 2008) 72.

2. Available tools or techniques for environmental regulation

Apart from the search for the meaning of regulation, the quest for a well-accepted explanation on how to classify a range of regulatory tools or techniques is another challenging task. The findings from the review of the literature demonstrate the differences in describing and grouping tools and techniques for regulation, each serving the specific aim of each piece of work. This part summarises and categorises the features of regulatory tools to connect the concept of regulation with other legal considerations examined in this thesis. This chapter accepts that the explanation in this part is not the only way of describing the elements, and they might be characterised in other studies by different people in different ways.

2.1 Issues used for the characterisation of tools and techniques for environmental regulation

A typology of tools and techniques for regulation can be categorised into three aspects. The first explains those through the lens of regulatory styles. The second considers who plays a vital role in creating and implementing regulation. The third summarises key sanctions or incentives generally used to support tools or techniques for regulation.

2.1.1 Styles of regulation

Even though there are many academic works describing how regulatory tools are categorised,¹³⁹ this chapter considers the style of regulation from the roles of governments in creating and enforcing a specific set of rule to influence social behaviour.¹⁴⁰ Admittedly, this chapter does not aim at laying down a new model in categorising regulation, but rather intends to connect the styles of regulation described below with tools or techniques of regulation explained in the next section. The regulatory styles that governments are involved in can be categorised into various types. However, this thesis exclusively considers command and control and self-regulation because they are interrelated to the legal tools this thesis is seeking to develop in Thailand.¹⁴¹

¹³⁹ For example, the work of Freiberg exhaustively classifies regulatory tools into six group (Arie Freiberg, *Regulation in Australia* (Federation Press 2017) Ch 6).

¹⁴⁰ Morgan and Yeung (n 89) 3.

¹⁴¹ As mentioned in the main research question in part 2 of chapter 1, this thesis seeks to study how to develop conservation agreements (CAs), which are based on the style of self-regulation, to work

2.1.1.1 Command and control

Command and control (C&C) is a conventional form of social control where a state stipulates a particular aim and condition for compliance to direct individuals to do or not to do some tasks. Regulation based on C&C might entail the prohibition of theft, backed up with criminal offences. In some literature, C&C is called direct regulation.¹⁴² A noticeable trait of C&C is its aim to influence human activities by stipulating what can be done and what is illegal (set minimum acceptable levels of behaviours), and imposing standards backed by criminal sanctions.¹⁴³ C&C can be divided into two essential parts. The Command part entails the prohibitions of certain forms of conduct or demand some positive actions.¹⁴⁴ The Control one signifies the negative sanctions that may result from non-compliance.¹⁴⁵ Environmental law of some jurisdictions, for example, Australia and the UK, is reliant on this type of regulatory style.¹⁴⁶

The strengths of C&C are varied. For instance, it can impose standards and sanctions to direct behaviour.¹⁴⁷ The obligations imposed on regulated parties are usually clear and based on public accountability and transparency.¹⁴⁸ Also, this approach helps regulators ensure that they can monitor and enforce the rules provided.¹⁴⁹ The negative consequences of using this technique are apparent in many respects. For instance, it may create unnecessary rules and complexity of the law¹⁵⁰ and gives rise to a set of centrally formulated standards.¹⁵¹ Ackermann observes that monitoring costs remain comparatively high, particularly for environmental protection.¹⁵² Apart from that, it might be inappropriate for the intervention in some activities. For example, setting standards for compliance might work well in controlling point-source pollution, but

alongside conventional legal tools, which are based on C&C regulation. This makes C&C and self-regulation worth examining here.

¹⁴² Gunningham, Grabosky and Sinclair (n 2) 39; Winston Harrington and Richard D Morgenstern, 'Economic Incentives versus Command and Control' (2004) Resources 13.

¹⁴³ Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (CUP 2018) 92.

¹⁴⁴ Baldwin, Cave, and Lodge (n 95) 106.

¹⁴⁵ *ibid.*

¹⁴⁶ Godden, Peel and McDonald (n 17) 188; Neil Gunningham, 'Environment Law, Regulation and Governance Shifting Architectures' (2012) 21 *Journal of Environmental Law* 179, 182.

¹⁴⁷ Godden, Peel and McDonald (n 17) 188.

¹⁴⁸ *ibid.*

¹⁴⁹ Howard Latin, 'Ideal versus Real Regulatory Efficiency: Implementation of Uniform Standards and Fine-Tuning Regulatory Reforms' (1985) 37 *Stanford Law Review* 1267, 1332.

¹⁵⁰ Gunningham, Grabosky and Sinclair (n 2) 46; Baldwin, Cave, and Lodge (n 95) 108.

¹⁵¹ Ogus (n 99) 246.

¹⁵² Bruce Ackermann, *The Uncertain Search for Environmental Quality* (The Free Press 1974) 165-207.

not so well for the non-point sources, particularly pollution arising from agricultural run-off or deforestation.¹⁵³

2.1.1.2 Self-regulation

Self-regulation is one of the regulatory styles being examined by various scholars.¹⁵⁴ Although it remains unclear who is referred to by the word self,¹⁵⁵ and what the role of states in this type of regulation is,¹⁵⁶ self-regulation is defined here as the format of social control by a group of professionals to control activities run by institutions in their group. It is the form of institutional control delegated by the state to achieve certain public policy tasks by private actors.¹⁵⁷ Self-regulation is different from C&C explained above where governments play a vital role in control the activity of firms.¹⁵⁸ For example, the duty that the law imposes requiring a person seeking to operate a particular business to request permission, licence or approval for running such business from a competent authority can be seen as a direct regulation. But the rules drafted by a group of merchants producing unique brand goods (e.g. coffee beans) to control the process of production to guarantee the quality of products can be seen as self-regulation. However, it does not mean that self-regulation is beyond control by a state.¹⁵⁹ Many scholars maintain that this format of regulation can be separated exhaustively into several sub-forms,¹⁶⁰ which include total self-regulation (or voluntary self-regulation) and mandated self-regulation.¹⁶¹ Total self-regulation can be

¹⁵³ Alvin L Alm, 'A Need for New Approach: Command-and Control is No Longer a Cure-all' (1992) 18 EPA Journal 6.

¹⁵⁴ For example, Sanford E Gaines and Clóna Kimber, 'Redirecting Self-Regulation' (2001) 13 Journal of Environmental Law 157.

¹⁵⁵ Gunningham, Grabosky and Sinclair (n 2) 50.

¹⁵⁶ Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 Modern Law Review 24, 26.

¹⁵⁷ Cosmo Graham, 'Self-Regulation' in G Richardson and H Genn (eds), *Administrative Law and Government Action, The Courts and Alternate Mechanisms of Review* (Clarendon Press 1994) Ch 8.

¹⁵⁸ Ira S Rubinstein, 'The Future of Self-Regulation is Co-Regulation' in Evan Selinger, Jules Polonetsky and Omer Tene (eds) *The Cambridge Handbook of Consumer Privacy* (CUP 2018) 504-507.

¹⁵⁹ Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 Current Legal Problems 103, 116.

¹⁶⁰ Ian Bartle and Peter Vass, *Self-regulation and The Regulatory State: A Survey of Policy and Practice* (CRI research report 17 2005) 17; Gunningham, Grabosky and Sinclair (n 2) 50; Rebecca Ong Yoke Chan, *Mobile communication and the protection of children* (Leiden University Press 2010) 243-245.

¹⁶¹ It should be noted that some academic work identifies voluntarism and co-regulation as separate styles of regulation. This chapter regards them as part of total self-regulation. See further academic work examining the concepts of voluntarism and co-regulation in Cary Coglianese, and Jenifer Nash, 'Motivating without Mandates? The Role of Voluntary Programs in Environmental Governance' in Michael Faure (ed), *Encyclopedia of Environmental Law*, vol 2 (Edward Elgar 2017) 239; Gunningham, Grabosky and Sinclair (n 2) 56; Chan (n 160) 244; Freiberg (n 90) 3; Douglas C Michael, 'Cooperative Implementation of Federal Regulations' (1996) 13 Yale Journal on Regulation 535, 541-544.

made where an industry or profession makes codes of practice or enforcement mechanisms for administering itself without any active involvement by states.¹⁶² Mandated self-regulation may happen when governments oblige a group of industry or profession to control itself, but allow such entities to elaborate the means or detail of control and enforcement subject to the approval or oversight by governments. This sub-type of self-regulation is distinguished from total self-regulation in that it does not arise from the free will of firms or individuals but instead from the threats of being regulated by a stricter regulatory measure.¹⁶³ This means that, in some circumstances, mandated self-regulation may share similar features with direct regulation.¹⁶⁴

Theoretically, the benefits of implementing self-regulation are prevalent. For example, it offers governments low monitoring costs as they do not need to check rule compliance, and the group of governed people can persuade firms to comply with self-regulated rules. Additionally, persons who are regulated usually understand the detail of those requirements as it involves the process of their work.¹⁶⁵ However, it might be a danger where self-regulation is employed to serve the benefit of business bodies rather than that of society.¹⁶⁶ Also, in establishing the regulatory scheme, there may be a challenge in ensuring that the rules and compliance serve the interests of all, not just the self-regulating group.¹⁶⁷

2.1.2 Key players in the process of implementation and enforcement

One of the noticeable points drawn from the styles of regulation in the previous subsection is that regulation requires a player initiating or implementing a specific set of regulatory rules or standards (regulator). While the crucial player acting as the regulator in C&C regulation is a state,¹⁶⁸ those acting as regulator in self-regulation

¹⁶² Black (n 156) 27.

¹⁶³ Chan (n 160).

¹⁶⁴ Several scholars argue that in reality C&C regulation can be worked in conjunction with self-regulation in many circumstances, allowing for innovative approaches of pollution control. For instance, regulatory agencies may allow industrial companies not to comply with some legal obligations if they can achieve comparable emission reductions by the schemes voluntarily operated by the companies (see Bettina Lange, 'Chapter 38: Command and Control Standards and Cross-Jurisdictional Harmonization' in Lees and Viñuales (n 3) 857-858; Harrington and Morgenstern (n 142)).

¹⁶⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) 110-113.

¹⁶⁶ Bell and others (n 98) 257.

¹⁶⁷ Ogus (n 99) 15.

¹⁶⁸ Gunningham, Grabosky and Sinclair (n 2) 93; Neil Gunningham and Cameron Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12 Annual Review of Law and Social Science 1, 3.

are varied subject to its specific sub-form, subject to different views of various scholars.¹⁶⁹ Although it is too definitive to generalise that a governmental body is a crucial regulator,¹⁷⁰ governmental bodies are a crucial player in implementing a specific type of regulation. This claim is evident from some reflection by the commentators in Australia who see the domination of governmental authorities in environmental regulation.¹⁷¹ However, in some regulatory styles, viz. self-regulation, firms or individuals may increase their roles in implementing or even enforcing the schemes of regulation, but the extent of roles of governments and individuals may be different depending upon the techniques chosen for use in a particular circumstance. Also, policy-makers may design the level of the role of a regulator differently reliant on the appropriateness of each circumstance.

The understanding of the roles of governmental bodies and non-governmental actors examined above is worth emphasising here because it indicates the levels of government intervention and participation by non-governmental players in environmental governance. The different models of holders, being examined in part 4 of chapter 5, will illustrate how such different roles result in different strengths and weaknesses of CA-enabling laws.¹⁷²

2.1.3 Legal sanctions and incentives

It is obvious that sanctions and incentives are overwhelmingly used to support the enforcement of the majority of regulatory tools or techniques. For example, direct regulation usually uses criminal offences to punish a person failing to comply with standards or rules¹⁷³ to make sure that a regulatee will not breach such standards or rules. At the same time, this sanction can help regulatory tools achieve their outcomes. However, some regulatory tools, including conservation agreements, may give incentives to a concerned person to encourage them to comply with the obligations agreed. In this regard, the use of incentives may replace that of sanctions to make

¹⁶⁹ The question of who is a regulator is hard to answer. One of the reasons for this is that there are no well-accepted sub-types of self-regulation among scholars as seen from various work regarding self-regulation as stated in sub-section 2.1.1.2 above.

¹⁷⁰ See Christopher Hood and others, *Regulation inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (OUP 1999) 21-22.

¹⁷¹ Godden, Peel and McDonald (n 17) 127.

¹⁷² See sub-section 4.4.1 of chapter 5.

¹⁷³ Ogus (n 99) 79.

regulation flexible for compliance. There are fundamental sanctions and incentives for regulation, namely legal sanctions and economic incentives that should be examined.

2.1.3.1 Legal sanctions

In general, the legal tools employed to coerce individuals or firms might be divided into three kinds. They are criminal and administrative sanctions as well as civil law remedies. These types of sanctions can be found under domestic laws globally. For instance nature conservation law in Thailand, as will be seen in chapter 4, utilises all three of these kinds of legal sanctions. Various CA-enabling laws, being examined in chapter 5, employ a range of legal sanctions. They are different in nature and purpose use as illustrated below.

A criminal sanction can be seen as a legal measure designed for punishing any person who contravenes a criminal prohibition via the criminal procedure.¹⁷⁴ It usually appears in the forms of criminal penalties, viz. imprisonment and fines, and various forms of supervised or unsupervised orders such as probation. The reason for using a criminal sanction can be varied, ranging from deterrence, denunciation, rehabilitation and incapacitation and protection of the community.¹⁷⁵ Criminal sanctions are usually imposed as a sanction of last resort, when all other sanctions fail, or to secure compliance with administrative measures.¹⁷⁶ Some literature places this option at the upper level of the regulatory pyramid,¹⁷⁷ which means that it should be used last.¹⁷⁸

The tools considered as civil law remedies are varied, including compensation, injunction and a civil penalty.¹⁷⁹ In the common law system, it can be any sanctions handed down by courts with non-criminal proceedings.¹⁸⁰ The example of a recent civil law remedy introduced to England is civil penalties or administrative financial penalties.¹⁸¹ They are primarily financial sanctions aiming to punish offenders or deter the decision to commit a crime rather than to compensate parties who are damaged but

¹⁷⁴ Bell and others (n 98) 292.

¹⁷⁵ Nicola Padfield, *Criminal Law* (9th edn, OUP 2014) 3.

¹⁷⁶ Reid, *Nature Conservation Law* (n 35) para 1.6.17.

¹⁷⁷ Ayres and Braithwaite (n 165) 35-38.

¹⁷⁸ Freiberg (n 90) 18.

¹⁷⁹ For the legal concept of the proposal for a civil penalty, see a comprehensive study for the context of England in Law Commission, *Criminal Liability in Regulatory Context* (Law Com CP No 195, 2010).

¹⁸⁰ Michael Gillooly and Nii Lante Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13 *University of Tasmania Law Review* 269.

¹⁸¹ Richard B Macrory, *Regulatory Justice: Making Sanctions Effective* (Final Report, Better Regulation Executive, 2006, 42-68. See also the Civil Penalties under Regulatory Enforcement and Sanctions Act 2008, Pt 3.

the process to enforce this legal tool is not a criminal procedure.¹⁸² Other forms of civil law remedy may include injunctions or monetary compensation aiming to repair the damage to injured persons at the expense of those who must be responsible for.¹⁸³ Compensation, as a civil tool, plays a vital role in recognising the right of property-right holders to claim reparation from those who cause the damage to them. The enforcement of civil and criminal sanctions are distinguished because the standard of proof as to whether defendants are liable or not in a civil case is the balance of probabilities; meanwhile, that of a criminal case is the proof beyond reasonable doubt.¹⁸⁴

Sanctions applied through administrative law are one of the legal sanctions that a regulator and enforcing authorities can use for operating regulatory tools. Many statutes impose specific duties on individuals or firms in relation to certain activities. This may involve requiring a permit or licence and compliance with conditions stated by the laws. Once licensees or permit holders fail to comply with the conditions, administrative sanctions may be enforced to them. They may range from imposing an administrative notice or revocation or suspension of licences or permits where the breach of legal or regulatory requirements takes place.¹⁸⁵ The use of administrative sanctions can be distinguished from that of criminal sanctions and civil law remedies in that while the two latter sanctions are commonly enforced by the courts, the administrative one can be enforced by administrative agencies.¹⁸⁶ Due to this character, some commentators argue that it looks more desirable than the use of criminal sanctions in that it is less costly,¹⁸⁷ less strict and more informal than criminal proceedings.¹⁸⁸

¹⁸² Colin S Diver, 'The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies' (197) 79 Columbia Law Review 1435, 1436.

¹⁸³ Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer Law International 2001) 211-212.

¹⁸⁴ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95 2002) 116.

¹⁸⁵ Bell and others (n 98) 291.

¹⁸⁶ Michael G Faure and Katarina Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24 Environmental Law Journal 253, 256; Godden, Peel and McDonald (n 17) 313.

¹⁸⁷ Michael G Faure, Anthony Ogus and Niels Philipsen, 'Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement' (2009) 31 Law & Policy 161.

¹⁸⁸ Faure and Svatikova (n 186) 255.

2.1.3.2 Economic incentives (or disincentives)

Although some works consider economic tools for regulation as a means of regulation rather than as the way of giving incentives or disincentives,¹⁸⁹ this thesis views economic instruments for regulation as both a regulatory style and an incentive mechanism used to fulfil social intervention. As a part of a regulatory style,¹⁹⁰ economic incentives (or disincentives) can fall under state regulation, self-regulation or co-regulation but not a stand-alone regulatory style.¹⁹¹ Nonetheless, there is no single agreed classification regarding the variety of forms of economic instruments.¹⁹² This is because most of them are usually employed by either governments or individuals to regulate economic activities in a market or society.

As an incentive instrument for regulation, economic incentives usually assist a regulator to implement regulation tools by using financial rewards, for example, giving money or tax relief to taxpayers. The function of an economic incentive can generate either negative or positive effects on parties involved. For example, firms may be guided by obtaining a subsidy when they act in the desired way and paying a charge when they act in an undesired way.¹⁹³ A central mechanism of this tool works by using economic benefits to encourage or direct people to change behaviour through a price signal or property systems. The establishment of economic controls may involve creating property rights, market creation, fiscal instruments and charge systems, liability instruments, performance bonds and deposit-refund systems.¹⁹⁴ The key features of these economic instruments will be explained in the next section.

¹⁸⁹ For instance, May explains economic regulation as the way in controlling or providing access to a market or ensuring the existence of a competitive market for goods and services (PJ May, 'Social Regulation' in Lester M Salamon (ed) *The Tools of Government: A Guide to the New Governance* (OUP 2002) 157).

¹⁹⁰ The terms 'economic tools' or 'market instruments' are commonly used where economic incentives are mentioned as a regulatory style alongside C&C regulation. In this regard, economic tools have a broader meaning and include the use of prices, incentives and deterrents to achieving environmental objectives (Bell and others (n 98) 247).

¹⁹¹ Lange (n 164) 857-859.

¹⁹² Gunningham, Grabosky and Sinclair (n 2) 70.

¹⁹³ Ogus (n 99) 245.

¹⁹⁴ Theodore Panayotou, 'Economic Instruments for Environmental Management and Sustainable Management' (Report to the UNEP, 1994) 7-22.

2.2 Ranges of tools and techniques for environmental regulation

There are many regulatory tools that can be used to deal with environmental issues as part of or alongside C&C regulation. An overview of the range of tools that can be used to deal with environmental problems is useful and shows how CAs, as a sub-form of voluntary agreements, can be one of the choices for this task. The summary moves from those based on C&C regulation with a high level of intrusion to those with less legal coercion. Admittedly, some regulatory tools have been used with different names, and the features of some tools may be modified to respond to a specific purpose. For example, imposing the duty to report on firms can be part of the conditions in issuing a licence by regulators or part of self-regulation by a group of firms. Therefore, the categorisation of the following tools is merely indicative rather than final. It examines some notable tools or techniques illustrating how the regulatory styles examined in sub-section 2.1.1 can be implemented through the use of sanctions or incentives spelt out in sub-section 2.1.3.

2.2.1 Banning/prohibiting

Bans or prohibitions, along with imposing a criminal penalty provide one the most intrusive tools based on C&C regulation. This type of regulatory option commonly entails imposing a legal prohibition on individuals or firms to refrain from doing a particular activity. It is based on hierarchical regulation that usually states a certain prohibition without allowing any discretion to interpret what to do or not to do.¹⁹⁵ Also, it is usually backed by criminal sanctions for violation. For instance, if the government bans the use of Paraquat, a dangerous herbicide used in the agricultural sector, with no exceptions under a specific law, this means that no one can use it, and a violation will be subject to be punished by criminal penalties.

2.2.2 Licensing

Licensing is a regulatory technique that a regulator (mainly governmental authorities) uses to impose conditions on carrying out a particular activity.¹⁹⁶ This type of regulatory technique commonly provides a general prohibition to prohibit individuals or firms from doing some activities, unless a licence, permit or approval is granted.

¹⁹⁵ Michiel A Heldeweg and Ramses A Wessel, 'The Appropriate Level of Enforcement in Multilevel Regulation Mapping Issues in Avoidance of Regulatory Overstretch' (2016) 5 International Law Research 227.

¹⁹⁶ Australian Law Reform Commission (n 184) 121.

This technique looks appealing in that it does not prohibit or ban a specific activity, but such an activity is allowable where individuals or firms agree to act within certain parameters.¹⁹⁷ Licensing ordinarily requires a regulatory body to develop requirements or standards for applying and issuing a licence with specific sanctions for non-compliance.¹⁹⁸ These penalties include cancellation, suspension, disqualification or variation of conditions, and the imposition of criminal sanctions for breach or failure to obtain a licence.¹⁹⁹ For example, if a fishing licence is required for fishing in a river, taking fish from the river is prohibited unless a fishing licence is granted. In most cases, a person who is granted a licence is obligated to comply with particular conditions specified in the licence.²⁰⁰

2.2.3 Taxes and charges

Taxes and charges are an economic instrument generally based on C&C regulation. They share a common regulatory concept in taking money from an individual to persuade them to change behaviour.²⁰¹ Also, they play a crucial role in discouraging people from harming nature, e.g. discharging wastewater into a river, by imposing a duty to pay when such activities arise. Taxes and charges can be implemented to correct misallocations arising from externalities by imposing a duty to pay for activities that cause harm to society, e.g. activities generating waste,²⁰² as well as to help bridge the gap between social costs and private benefits,²⁰³ which have been externalised. Specifically speaking, taxes are able to help promote a new activity by giving firms financial incentives to change behaviour. Some commentators argue that taxes are capable of reaching small and medium-sized enterprises (SMEs) and individuals that are difficult and costly to regulate by other means.²⁰⁴ However, taxation may result in undesirable side-effects; for example, an unscrupulous operator

¹⁹⁷ David Farrier and Paul Stein, *The Environmental Law Handbook: Planning and Land Use in NSW* (4th edn, Redfern Legal Centre Publishing 2006) 46-47.

¹⁹⁸ *ibid.*

¹⁹⁹ F Smith and R Ward, 'Regulatory Architecture: Practitioner Perspectives' in *Essays in Australian Consumer Affairs* (Department of Justice 2005).

²⁰⁰ Martha Roggenkamp and others, *Energy Law in Europe* (2nd edn, OUP 2005) 1281.

²⁰¹ Benjamin J Richardson, *Environmental Regulation through Financial Organisations: Comparative Perspectives on the Industrialised Nations* (Kluwer Law International 2002) 192.

²⁰² Ogus (n 99) 246.

²⁰³ David Wilkinson, *Environment and Law* (Routledge 2002) 183.

²⁰⁴ John Harman, 'Environmental Regulation in the 21st Century' (2004) 6 *Environmental Law Review* 141, 150.

fly-tipping to avoid a Landfill Tax. At the same time, tax evasion prevention might be challenging to manage.²⁰⁵

2.2.4 Civil liability

Civil liability is a legal concept that has been developed in private law for a long time. Under the umbrella of the law of torts, it can be used as a last resort to award compensation to injured persons when damage arises. Although there is debate over whether it should be considered as an economic instrument or not,²⁰⁶ its function can influence the behaviour of a person likely to cause harm and take responsibility for damage arising from their activities.²⁰⁷ This legal tool imposes legal responsibilities by requiring any person who causes or is in a position to be responsible for the damage to, among others, private property and human health to pay compensation or to repair such loss. Although there is a low cost to the state in creating a system and no cost for monitoring,²⁰⁸ civil liability retains some limits. For instance, it might be challenging to prove a clear causal link between the polluter's behaviour and the damage that has arisen.²⁰⁹ In terms of its effectiveness, there is nothing to guarantee that the person liable will be able to pay for the damage caused. Lastly, it is difficult to use a civil liability regime to compensate for the loss of natural value due to the difficulty in calculating damage or loss, specifically, where environmental goods have no market value.²¹⁰

2.2.5 Certification

Certification is a system of formal or authoritative recognition that persons or organisations have attained specific qualifications, met specified standards, or adopted certain processes. Certification may be awarded by state or non-state agencies or bodies.²¹¹ For example, a competent agency may grant certification to a company producing refrigerators to certify low energy consumption products. This certification

²⁰⁵ *ibid.*

²⁰⁶ Michael Faure, 'Designing Incentives Regulation for the Environment' in Eric Brousseau and others (eds), *Global Environmental Commons: Analytical and Political Challenges in Building Governance Mechanisms* (OUP 2012) 280.

²⁰⁷ Gunningham, Grabosky and Sinclair (n 2) 78; Marek Prityi and others, 'Locating Environmental Law Functions Among Legislative, Judicial and Implementation Bodies' in Kirk W Junker (ed), *Environmental Law Across Cultures: Comparisons for Legal Practice* (2020) 49.

²⁰⁸ Nonetheless, it may constitute costs for those (e.g. injured persons) who brought the actions to a court for remedies.

²⁰⁹ Monika Hinteregger, 'Chapter 45: Environmental Liability' in Lees and Viñuales (n 3) 1033-1034.

²¹⁰ *ibid* 1038.

²¹¹ Freiberg (n 90) 11.

helps consumers to decide which model of refrigerators are economical ones. It can be seen that a non-certified refrigerator is not excluded from a market but may attract less attention from buyers. Certification can be observed as a form of regulation or indirect regulation or overlap between both regulatory styles subject to specific conditions of each certification scheme.²¹² It means that it can be part of C&C regulation, where a governmental body initiates a certificate to encourage firms to perform duty beyond a legal requirement, or self-regulation, where a group of firms, for example, initiates this type of scheme. Another certification scheme can be observed from awarding certificates of ISO 14001 by a non-governmental body as will be examined in the next chapter.²¹³

2.2.6 Information disclosure

The disclosure of information is vital in various aspects, specifically, where a regulator seeks to deal with information asymmetry.²¹⁴ Governments may require a producer of goods or services to disclose specific pieces of information about the quality or particular characteristics of products or services to the consumer,²¹⁵ for instance, the amount of fat in a piece of hamburger. This information can help buyers decide whether they should buy such products.

Another example of information disclosure is product labelling. It involves imposing a duty on producers to disclose information and is a regulatory tool that is usually used when the products potentially cause harm to consumers.²¹⁶ This technique is sometimes used voluntarily to prevent an information imbalance between producers and consumers.²¹⁷ It can generate benefits to the public because people can use the information revealed on a product label to decide whether they will buy the product or not. Product labelling, nevertheless, may have limitations as making labelling means an increase in production costs. It appears that the producers may not bear that increasing cost, but prefer to include it in the market price of products. At the same

²¹² Gunningham, Grabosky and Sinclair (n 2) 60.

²¹³ See sub-section 3.3.4 (third party initiatives) of chapter 3.

²¹⁴ See the economic grounds for regulation regarding information deficits in sub-section 1.3.1 above.

²¹⁵ Victorian Competition and Efficiency Commission (VCEC), *The Victorian Regulatory System* (VCEC 2009).

Ogus called this type of requirement 'mandatory disclosure' (Ogus (n 99) 122).

²¹⁶ Kathryn Harrison, 'Voluntarism and Environmental Governance' in Edward A Parson (ed), *Governing the Environment: Persistent Challenges, Uncertain Innovations* (University of Toronto Press 2001) 212.

²¹⁷ Ogus (n 99) 121.

time, the governments have to be responsible for the cost of monitoring compliance (if this technique is a mandatory requirement).²¹⁸

2.2.7 Reporting

Making a report is widely employed as an obligation between the parties where one seeks to monitor or see the progress of compliance of another under a specific scheme or agreement. As mentioned at the beginning paragraph of this section, reporting can be a part of C&C regulation, where a regulator issues a licence coupled with a duty to report on the licensee, or an obligation under a voluntary agreement, as well as under the suggestion of a code of conduct. Such multifunctional roles exemplify the adaptable and flexible role of this regulatory option. As part of C&C regulation, providing a report may be one of the obligations that regulatees must do to fulfil the conditions of a licence they obtain or as an indicator of compliance to the public.²¹⁹ Also, reporting might be a duty imposed by an agreement between a government and a sector of firms as part of mandated self-regulation summarised in sub-section 2.1.1.2 above.

2.2.8 Property rights

The meaning of property rights is described in different ways. Some scholars view property rights from an economic view as the rights of an owner over property which includes the rights to use property and to exclude others from it.²²⁰ This chapter considers property rights in the sense of ‘regulatory property rights’ summarised by Godt. Property rights are employed here as new emerging rights, able to be enforced against anyone and transferable.²²¹ The very nature of this type of regulatory tool is that they are generally created to serve some certain regulatory goals.²²² This concept recognises that legal regulation may create new objects of property that fall outside the traditional domain of corporeal things.²²³ Property rights usually establish a specific entitlement to individuals or firms to enjoy a particular benefit, for example, to acknowledge someone’s entitlement to use natural resources or to protect the interest

²¹⁸ Australian Government, *Best Practice Regulation Handbook* (Canberra 2007) 109.

²¹⁹ John Braithwaite, Judith Healy and Kathryn Dwan, *The Governance of Health Safety and Quality* (Commonwealth of Australia 2005) 22.

²²⁰ Nigar Hashimzade, Gareth Myles, and John Black, *A Dictionary of Economics* (5th edn, OUP 2017).

²²¹ Christine Godt, ‘Chapter 1 “Regulatory Property Rights” – A Challenge to Property Theory’ in Godt (n 84) 13.

²²² *ibid* 1.

²²³ *ibid* 13.

of individuals who create innovative intellectual property.²²⁴ However, this approach has some limitations and negative consequences. For example, it is less applicable to situations where the resource is mobile or short-lived. Also, it can be used for political agendas, e.g. conferring the rights for the benefit of specific groups, which is corruption. Additionally, granting a new property right might affect other existing rights.²²⁵

2.2.9 Tradable permits and market creation

Based on the notion of property rights mentioned above,²²⁶ tradable permits and market creation can be applied by conferring certain rights to firms or individuals to allow them to carry out activities that governments seek to control or support instead of control by issuing licences or permits.²²⁷ This group of regulatory tools is a combination of free-market environmentalism²²⁸ and C&C regulation.²²⁹ The key mechanism of this tool involves the creation of economic value in a particular otherwise unregulated public good (e.g. water, air and atmosphere). Then, it makes such public goods tradable under the condition that any person who desires to benefit from such public goods must comply with the market rules. This concept has been applied to some specific activities. For example, the market of carbon credit trading under the EU regime required firms obliged to limit carbon emission but enables them to meet their obligations by buying a carbon credit from those who have over-achieved and thus hold a credit.²³⁰ This market is used to address global warming and climate change issues. The creation of a new market is advantageous in that a new right created under a new market can be transferable.²³¹

2.2.10 Subsidies and grants

Subsidies and grants are economic instruments that share a common regulatory concept. For instance, they commonly involve granting a financial incentive to an

²²⁴ Ogus (n 99) 257.

²²⁵ Panayotou (n 194)

²²⁶ John McMillan, *Reinventing the Bazaar: A Natural History of Markets* (WW Norton & Co 2002) ix.

²²⁷ Australian Government (n 218) 110.

²²⁸ 'Free market environmentalism' in this regard is the notion of believing that the free market is in a better position to deal with health and environmental issues than the use of the governmental intervention (Chris Park, *A Dictionary of Environment and Conservation* (1st edn, OUP 2007)).

²²⁹ Peter Kinrade, 'Towards Ecologically Sustainable Development: The Role and Shortcoming of Markets' in R Eckersley (ed), *Markets, the State and the Environment: Towards Intergration* (Macmillan Education 1995) 89 and 96.

²³⁰ European Commission, 'The EU Emissions Trading System (EU ETS)'

<https://ec.europa.eu/clima/policies/ets_en> accessed 14 May 2020.

²³¹ Panayotou (n 194) 13.

individual to support or alter the practices of individuals or firms in a specific manner to stimulate or promote a service or activity.²³² The form of using this tool may be varied. For instance, capital works grants, project-based grants, recurrent funding grants or service agreement grants.²³³ Also, this tool can be implemented in the form of a grant or tax launched to change the behaviour of people by encouraging doing eco-friendly practices.²³⁴ In the European Union countries, Agri-environment schemes under the Common Agricultural Policy (CAP) are the source of funding. They provide payment to encourage farmers to carry out eco-friendly practices on their farms that go beyond legal obligations. In exchange, this type of scheme pays the participating farmers for the provision of environmental services.²³⁵

2.2.11 Voluntary environmental agreements

Although in many cases voluntary environmental agreements are used by governments to encourage firms or individuals to do some tasks, the very nature of this legal option is based on self-regulation.²³⁶ The application of this tool can be a stand-alone scheme or as a subsidiary tool for achieving the goal stipulated by the law.²³⁷ The features and aims of an agreement can be varied and range from those created under private law of contract to those required by statutes (regulatory contracts).²³⁸ For example, an agreement can be used to encourage landowners to conserve natural features on privately-owned land as under the label ‘CAs’, which will be extensively examined in the later chapters. Apart from that, as the agreements are an important regulatory tool for this research, details regarding the definition, characteristics, strengths and weaknesses in implementing this tool will be illustrated in-depth in the next chapter.

Conclusion

As argued in the beginning paragraph of this chapter, the examination of the theoretical concepts and tools for regulation will help understand the existing laws in Thailand

²³² D R Beam and T J Conlan, ‘Grants’ in Salamon (n 189) 341.

²³³ State Services Authority Victoria, ‘Review of Not-for-Profit Regulation’ (Final Report, State Services Authority 2007) 59.

²³⁴ Nancy Kubasek, and Gary Silverman, *Environmental Law* (8th ed, Pearson 2014) 122.

²³⁵ See European Commission, ‘Agriculture and the Environment: Introduction’

<https://ec.europa.eu/agriculture/envir/measures_en> accessed 14 May 2020.

²³⁶ Stuart Bell and Donald McGillivray, *Environmental Law* (7th edn, OUP 2008) 248; Ross and Rowan-Robinson (n 47) 88.

²³⁷ Freiberg (n 90) 10.

²³⁸ Macrory (n 134) 633.

and the comparator jurisdictions. This chapter has highlighted various points illustrating how the theoretical concepts and tools for regulation function as the backbone of legal measures and rules. Although some points in this chapter remain unsettled and overlap with each other, the study has noted some conclusions worth summarising here.

The findings here establish that the law is one of the regulatory tools imposed by governments to intervene in or influence social behaviour. The law is a crucial tool the governments can use to regulate activities for the public interest. Also, the use of law for regulating human activities may stem from various grounds, ranging from economic, social and environmental justification.

Regarding regulatory styles and available regulatory options, regulation might fall under the regulatory styles of C&C regulation or self-regulation, which reflect different levels of government involvement and intervention. While some must be implemented in legal form, many others may not. Those implemented through the use of legal coercion can be strengthened by various types of sanctions, including the use of criminal, administrative and civil penalties. The range of tools and techniques for regulation reflects the complexity of the regulatory landscape. It indicates that any one particular activity might be the subject of intervention by the use of a single regulatory tool or by a combination of different ones adopting different styles of regulation. The complexity of available tools for regulation is also influenced by the variety of styles, sanctions and incentives available under a domestic legal regime. This reflection also illustrates that a C&C-based legal tool might be introduced alongside a contract-based instrument to achieve desired objectives.²³⁹

This summary shows that there is a wide range of means available to try to shape people's behaviour, with varying degrees of coercion and flexibility. In seeking to deliver effective conservation, the limitations faced by the strict and rigid options that underpin standard C & C approaches²⁴⁰ suggest that there is room to look beyond such approaches at other mechanisms that can encourage conservation in a more positive way.

²³⁹ Baldwin, Cave, and Lodge (n 95) 116-117.

²⁴⁰ Colin T Reid, 'Towards a Biodiversity Law: The Changing Nature of Wildlife Law in Scotland' (2012) 15 *Journal of International Wildlife Law & Policy* 202, 223-224.

Chapter 3 Fundamental concepts of voluntary environmental agreements (VEAs)

Introduction

The preliminary observation in chapter 1 illustrates that conservation agreements (CAs) are a private law vehicle implemented to serve the public interest. Chapter 1 also indicates that they operate voluntarily similar to a simple private contract, and are an outcome of statutory intervention. These characteristics beg the questions as to how CAs can be observed from theoretical and regulatory perspectives, and why the fundamental concepts and ideas of voluntary environmental agreements (VEAs) should be investigated as part of this thesis.

Although a handful of work examines CAs from a theoretical perspective,²⁴¹ this thesis argues that there is room to observe CAs through the examination of VEAs with two supporting reasons. First, CAs fall under a sub-form of voluntary environmental agreements, as will be seen from the examination in the next part. Second, a myriad of papers has studied VEAs from a theoretical perspective, which means that the study on what VEAs mean, how they function, and what the strengths and weaknesses of VEAs are, would help understand the function of CAs.

After VEAs were preliminarily investigated and discussed in section 2.2 of chapter 2, this chapter examines the foundations of VEAs and how they can be implemented as a regulatory tool to deal with environmental issues. It illustrates several vital points concerning the use of VEAs. They include a definition, essential characteristics, roles, typologies of voluntary environmental agreements, the reasons for and the limitations of their use and examples of them.

Similar to the aim of chapter 2, this chapter is not a comprehensive study about the concepts of VEAs, but rather provides some crucial points illustrating how the concepts behind VEAs are interconnected with those of CAs to be investigated in the following chapters. Those not relevant to the understanding of such an interconnection are excluded from the examination in this chapter.

²⁴¹ For example, Reid and Nsoh (n 17) ch 5; Owley (n 29) 1043; Elisabeth Peden, 'Conservation Agreements - Contracts or Not?' (2007) 25 *Environmental and Planning Law Journal* 136.

1. Definition, essential characteristics and roles of VEAs

Although many parts in chapters 1 and 2 provided some aspects of the definition, essential characteristics, and roles of VEAs, it is worth having a comprehensive examination in this chapter to show how VEAs are defined or characterised by scholars. An examination of these points will help in understanding common features of CAs as a sub-set of VEAs, as will be explored below.

1.1 Definition

One of the most critical issues to be examined in this chapter is the definition of a ‘voluntary environmental agreement’. Although this tool has been used widely for decades, there are no settled definitions and characteristics of VEAs.²⁴² This is because the term has been used in different contexts and various areas of environmental protection policy.²⁴³ For instance, many writers use the term voluntary agreements while others make use of negotiated agreements or voluntary commitments in their work.²⁴⁴ This thesis views this term in a broad meaning. It refers to any kinds of commitments and consensus voluntarily agreed between public bodies and private actors²⁴⁵ as well as the commitments between individual firms and their associations to achieve certain environmental objectives whether these are formal or informal in form.²⁴⁶ This definition covers instruments that are used with various names but share a similar principle based on a voluntary basis, whether they are individual commitments or sector-wide deals. This includes management agreements

²⁴² Betty Gebers, ‘The Diversity of Environmental Agreements’ in Peiter Glasbergen (ed), *Co-operative Environmental Governance, Environment & Policy*, vol 12 (Springer 1998) 91; Coglianese and Nash (n 161) 240.

²⁴³ Panagiotis Karamanos, ‘Voluntary Environmental Agreements: Evolution and Definition of a New Environmental Policy Approach’ (2001) 1 *Journal of Environmental Planning and Management* 44, 69; Coglianese and Nash (n 161) 240.

²⁴⁴ Peter Börkey and François Lévêque, ‘Voluntary Approaches for Environmental Protection in the European Union – A survey’ (2000) 10 *European Environment* 35, 36; Mark Storey, Gale A Boyd and Jeffrey Dowd, ‘Voluntary Agreements with Industry’ (Fondazione Eni Enrico Mattei (FEEM) Working Paper 1997) 1.

²⁴⁵ The word ‘agreed’ in this sense also includes the situation whereby private actors commit unilaterally with public bodies to do or not to do some tasks, and public bodies accept those commitments. This circumstance occurs in the VEAs called ‘unilateral commitments’ that they are described in sub-section 3.3.3 below.

The private actors in this regard could be firms, a group or association of firms or individuals.

²⁴⁶ Ichiro Sumikura, ‘Environmental Voluntary Agreements and the Rule of Law in England and Japan: A Common Law Perspective and a Civil Law Perspective’ (2000) 1 *Environmental Law Network International* 57; European Environment Agency (EEA), ‘Environmental Agreements: Environmental Effectiveness’ (Environmental Issues Series no 3, vol 1, EEA 1997) 20.

implemented in the UK, gentlemen's agreements and covenants used in the Netherlands, environmental contracts in Belgium, environment and pollution control agreements in Japan²⁴⁷ and voluntary initiatives in the USA. It should be noted that many papers intentionally explain the meaning of VEAs for their specific purposes, mainly in industrial pollution control.²⁴⁸ It is not surprising that the majority of those papers explicitly state that VEAs are concluded between firms or associations of firms and public bodies.²⁴⁹ There is a little work stating that individuals can be a participant in this kind of an agreement.²⁵⁰ This paper views private participants in a broad meaning, and they include firms, their associations and individuals.

1.2 Essential characteristics

Regarding their essential characteristics, VEAs can be distinguished from C&C regulatory tools described in chapter 2 in several respects.²⁵¹ In the first place, VEAs are an outcome of negotiation and cooperation between public bodies and the private sector²⁵² to design a framework of incentives to parties.²⁵³ This is different from C&C regulatory tools whereby the duties for compliance originate from a non-negotiating process.²⁵⁴ Second, agreements are varied in terms of the regulatory formality;²⁵⁵ they might be legally binding agreements or non-binding ones (a mere 'gentlemen's

²⁴⁷ Rie Tsutsumi, 'The Nature of Voluntary Agreements in Japan- Functions of Environment and Pollution Control Agreements,' (2001) 9 *Journal of Cleaner Production* 145, 153.

²⁴⁸ Gaines and Kimber (n 154) 177; Colin Trehearne, 'Japanese Voluntary Environmental Agreements: Political-economic Stability as Contributor to Effectiveness' (Master Degree Dissertation, University of British Columbia 2007) 16.

²⁴⁹ Environmental Law Network International (ELNI), *Environmental Agreements: the Role and Effect of Environmental Agreements in Environmental Policies* (Cameron May 1998) 60.

²⁵⁰ Gaines and Kimber (n 154) 177.

²⁵¹ Geoffrey Hazard and Eric Orts, 'Environmental Contracts in the United States' in Eric W Orts and Kurt Deketelaere (eds), *Environmental Contracts* (Kluwer Law International 2001) 76-82.

²⁵² Public-private cooperation can be divided into three main categories considered from the role of the private sector. They are public-private consultation, public-private negotiation and framework setting. In this regard, VEAs mainly involve public-private negotiation (Edoardo Croci (ed), *The Handbook of Environmental Voluntary Agreements: Design, Implementation and Evaluation Issues* (Springer Netherlands 2005) 26).

²⁵³ *ibid.*

²⁵⁴ Admittedly, the process of preparing C&C regulation in many states usually involves public hearings or discussion about the weaknesses and strengths of the use of a proposed legal framework. However, such public involvement may not be a full negotiation between a regulator and regulatees. This is because public bodies are in a position of deciding whether to use a C&C framework. It is distinct from negotiation and cooperation in VEAs where private actors have more chances in making decisions about the normative contents of a proposed agreement.

²⁵⁵ Sumikura (n 246) 57.

agreement’).²⁵⁶ VEA, therefore, is a flexible policy choice for negotiation on both legal form and normative content while C&C is a top-down regulatory style that usually has legal status and features. Third, this tool does not impose mandatory participation on firms or individuals,²⁵⁷ and this makes individuals and firms free to decide whether to opt into a VEA scheme or not. This is different from persons who are regulated under C&C regulation which is subject to rule compliance.

1.3 Roles of VEAs

Regarding the roles of this tool, policy- or law-makers might employ VEAs for many purposes, including for increasing the role of private actors in environmental governance.²⁵⁸ Also, this tool offers alternative means for regulation apart from employing direct regulatory tools. This can be seen in more detail: firstly, VEAs are a mechanism that enables private actors to increase their roles in carrying out activities towards an environmental achievement. VEAs are agreements whereby individuals, firms and firm associations can negotiate the means or the target of achievement.²⁵⁹ Such a role can be seen explicitly in the case that the law acknowledges the legal status or their legally-binding effects. In this case, the activities which firms have done under the VEAs’ requirements will be recognised by the law acknowledging or creating such VEAs. Secondly, VEAs can be used as an environmental management tool when there is no direct statutory tool in dealing with a particular environmental issue.²⁶⁰ In this role, VEAs might act as an alternative mechanism for dealing with environmental issues. Thirdly, VEAs can be used as a policy instrument enabling government assistance for firms or individuals seeking to improve environmental, process and

²⁵⁶ Eckard Reh binder, ‘Environmental Agreements - A New Instrument of Environmental Policy’ (1997) 27 *Environmental Law and Policy* 258, 260; Jon Birger Skjærseth, ‘Environmental “Voluntary” Agreements: Conditions for Making Them Work’ (2000) 6 *Swiss Political Science Review* 57, 59.

²⁵⁷ Skjærseth (n 256) 60.

²⁵⁸ As observed in chapter 2, the words ‘regulation’ and ‘governance’ may occasionally be used interchangeably. The word environmental governance is emphasised here to reflect the participation of non-governmental actors in environmental regulation. See the explanation of governance in Godden, Peel and McDonald (n 17) 108; Kotzé (n 88) 82-3.

²⁵⁹ Lee Solsbery and Peter Wiederkehr, ‘Voluntary Approaches for Energy-related CO₂ Abatement’ (1995) 196 *The OECD Observer* 41, 45.

²⁶⁰ Natalia M Gusmerotti and Francesco Testa, ‘The Role of Environmental Agreements for Environmental and Biodiversity Protection: Evidence from European Experiences’ in Fabiano E Molinelli and Leonardo S Paccagnella (eds), *Economics of Regulation and Outsourcing* (Nova Science Publishers 2012) 41; Coglianese and Nash (n 161) 241.

product performance.²⁶¹ Fourthly, they can work in a substitutive role in place of or in combination with mandatory measures.²⁶² These roles of VEAs are reflected in several aspects of the legal features of CAs. For instance, their role in increasing the roles of non-governmental bodies in regulating land-use and looking after natural features on land can be observed from CA-enabling laws in the USA, as will be examined in sections 4.3 and 4.4 of chapter 5.

2. Origins of VEAs

VEAs have been used as a public policy choice widely in many jurisdictions worldwide for a long time,²⁶³ but they are used in different legal and social contexts. For instance, in Asia, VEAs have been implemented in Japan since the 1960s.²⁶⁴ They are mainly used to mitigate pollution issues arising from the industrial sector.²⁶⁵ In Europe, some types of negotiated VEAs have been widely developed and implemented in many countries.²⁶⁶ They were mostly concluded in the Netherlands, Germany and France,²⁶⁷ but their features and enforcing mechanisms are varied.²⁶⁸ These agreements range from informal non-binding agreements to legally-binding ones.²⁶⁹ Although many papers question the legitimacy of using non-legally binding agreements and suggest to strengthen VEAs by recognising them under statutes, non-binding agreements are still popular and used in some countries.²⁷⁰

In the UK, VEAs have been introduced to deal with particular issues for several decades. They have been used for a planning purpose since 1909²⁷¹ and for the purpose

²⁶¹ Gusmerotti and Testa (n 260) 41.

²⁶² Croci (n 252) 20.

²⁶³ Luc Lavrysen, 'Legal Framework for the Conclusion of Environmental Covenants in Belgium at the Federal Level and at the Level of the Flemish Region' (2000) 1 *Environmental Law Network International* 1.

²⁶⁴ Karamanos (n 243) 71.

²⁶⁵ *ibid.*

²⁶⁶ Andrew Jordan, Rüdiger Wurzel and Anthony R Zito, "'New" Environmental Policy Instruments: An Evolution or a Revolution in Environmental Policy?' in Andrew Jordan and others (eds), *New Instruments of Environmental Governance? National Experiences and Prospects* (Frank Cass 2003) 102.

²⁶⁷ Orts and Deketelaere (n 251) 5.

²⁶⁸ Michael Böcher and Annette Elisabeth, 'Conditions for the Emergence of Alternative Environmental Policy Instruments' (Paper presented at the 2nd ECPR-conference 2003) 260.

²⁶⁹ Reh binder (n 256) 261.

²⁷⁰ *ibid.*

²⁷¹ Ross and Rowan-Robinson (n 47) 85; Housing, Town Planning, &c. Act 1909, Sch 4, para. 13.

of nature conservation since the 1930s.²⁷² After that, they have been attached in parallel with statutory obligations in various statutes, for example, under the Countryside (Scotland) Act 1967.²⁷³ A voluntary-based measure is a popular strategy in conserving nature on privately-owned land because it is less intrusive than that imposed by traditional C&C.²⁷⁴ Also, it is an instrument that can help encourage active or positive management.²⁷⁵

3. VEAs categorisation

As the term ‘VEA’ has been used in different ways in several jurisdictions, this may cause misunderstanding on their application in practice. For example, it may engender the question of whether environmental covenants and voluntary public schemes are classified as a VEA or not and how different they are. It is, therefore, essential to characterise a typology of VEAs to make this point clear. The findings drawn from reviewing of literature illustrate the diversity of the categories observing VEAs. Many papers have no intention to make a general conclusion but instead to create a VEA typology for explaining the specific aims of their study.²⁷⁶ This chapter has no intention to create a new typology of VEAs but aims at presenting how VEAs can be viewed from different aspects. Admittedly, the following views are not exhaustive, but it will be helpful in understanding the characteristics, strengths and weaknesses of tools falling under the definition of VEAs. The first category characterises VEAs based on the involvement of the law in creating VEAs. The second one observes VEAs from the number of participants in VEAs, and the last one evaluates VEAs from their formation and content.

²⁷² This can be observed from the use of statutory covenants under the National Trust Act 1937, s 8.

²⁷³ Ross and Rowan-Robinson (n 47) 87.

²⁷⁴ Bell and McGillivray point out that regulatory control should be used as a last resort for land use regulation because the task for privately-owned land conservation should be the responsibility of landowners, rather than by using a top-down approach (Bell and McGillivray (n 236) 691).

²⁷⁵ Reid, ‘Towards a Biodiversity Law’ (n 240) 214.

²⁷⁶ For example, Croci divides VEAs into six categories. They comprise voluntary public schemes, negotiated agreements, unilateral commitments recognised by the public bodies, unilateral commitments, third party initiatives and private agreements (Croci (n 252) 7). Segerson and Miceli divide this tool into VEAs offering positive incentives and those imposing the threat to introduce strict regulation if regulatees fail to be the parties to the VEAs (Kathleen Segerson and Thomas J Miceli, ‘Voluntary Environmental Agreements: Good or Bad News for Environmental Protection’ (1998) 36 *Journal of Environmental Economics and Management* 109, 110).

3.1 VEAs viewed from the involvement of the law in creating VEAs

As one of the crucial considerations about CAs entails the examination whether they require establishment by the law, it is worth examining at the outset whether or not VEAs, created in many jurisdictions, are an outcome of statutory intervention. Having examined relevant literature, VEAs can be mainly grouped as those created by legal authorisation (statutory VEAs) and others created without the authorisation of law (non-statutory VEAs).

3.1.1 Statutory VEAs

Statutory VEAs are those where specific legislation acknowledges their formation. The law may be involved in the creation of statutory VEAs in several ways. VEAs viewed from this perspective can be summarised loosely into two following types.

The first is the VEAs where a particular statute allows public bodies, e.g. a minister or head of a government department, to create an agreement. VEAs in this category may stipulate the underlying content and the details of VEAs or lay down details regarding VEAs' implementation and enforcement.²⁷⁷ For instance, in Denmark, VEAs made under the Environmental Protection Act 2016 are examples of VEAs in this group. This legislation entitles a competent governmental body to conclude agreements with enterprises or associations for the purpose of environmental improvement subject to details and content stipulated under this legislation.²⁷⁸

The second type of statutory VEAs is those where a particular statute empowers an authority to make a decision to find appropriate measures to achieve a specific environmental goal, but does not explicitly state the power to conclude a certain VEA.²⁷⁹ In this regard, this statutory provision may grant the power to public bodies to conclude a VEA in particular circumstance. The Dutch Environmental Management Act 2004 is an example of the statute conferring this type of power. This Act allows a competent governmental body to grant subsidies for activities in the field of environmental management, with the details of how subsidies can be granted to eligible persons. It falls under this categorisation because it does not stipulate whether

²⁷⁷ Sumikura (n 246) 58.

²⁷⁸ Environment Protection Act (No 1189 of 2016), s 10.

²⁷⁹ Sumikura (n 246) 58.

such a competent body must prepare this award in the form of a VEA or not. However, this provision can be used to make a VEA that is originated from the statutory power.

3.1.2 Non-statutory VEAs

Non-statutory VEAs, on the other hand, have no statutory authorisation. Hence, this kind of VEA might be legally binding or not, subject to the private law of contract. Specifically speaking, the clarity of their legally-binding effect is subject to the parties' intention whether they want the VEAs they created to be legal agreements or not; ambiguity on this can give rise to the problem of what to do if the parties fail to comply with the commitments.²⁸⁰ Management agreements employed in Scotland, before the Countryside Act 1968 was introduced, are illustrative of this type of VEA. In that period, activities carried out in rural areas, e.g. agricultural and afforestation sectors, had not been fully controlled by C&C legislation. Governments, therefore, used this kind of agreements to negotiate with farmland holders based on freedom of contract.²⁸¹ Another example is the River Contract of the Upper-Meuse implemented in 1996 in Belgium. It is a collective VEA with various participating actors, including communities, firms and educational institutions. It does not aim to create inflexible legal obligations, but merely encourages its participants in taking appropriate measures for conserving the river.²⁸²

3.2 VEAs classified by the number of participants

The potential exists for VEAs to engage multiple parties and to affect whole sectors of an industry, although as noted in the preliminary review in chapter 1, the specific example of CAs are generally created bilaterally between a landowner and an eligible governmental or non-governmental body. The literature reveals that a VEA can be created either as a bipartite agreement, in which two parties agree to do certain things or a multi-party one that a group of people or firm agree to do the same task. This notion influences categorisation in this part. It considers VEAs as individual VEAs and sectoral or collective VEAs.

²⁸⁰ *ibid* 58-59.

²⁸¹ Ross and Rowan-Robinson (n 47) 86.

²⁸² ELNI (n 249) 227-232.

3.2.1 Individual VEAs

Individual VEAs are those concluded between public bodies, whether central or local agencies, and private actors. After entering into this type of VEA, individuals or firms bind themselves individually and separately.²⁸³ Individual VEAs can be created between either particular individuals or firms and public bodies. In general, individual VEAs are attractive from the perspective of individuals or firms because this type of VEA generally enables individuals and firms to negotiate with government agencies individually. Hence, those persons can come to terms regarding the conditions or obligations that they can fulfil as well as having an opportunity to discuss their limitations in implementing the prospective VEAs. However, the terms and conditions of some individual VEAs may be already set by statutes or public bodies, and potential participants may not be able to negotiate but still freely decide whether to sign up or not. Management agreements established by landowners and a competent agency under the Wildlife and Countryside Act 1981 (UK) can be evidence of the existence of this type of VEAs.

3.2.2 Sectoral or collective VEAs

Sectoral or collective VEAs in this regard refer to those where the agreement terms require a group of participants (mostly an association of firms) to be parties for reaching a common purpose.²⁸⁴ Although the parties to sectoral VEAs may have common targets to achieve, the liability rules applying for this type of the agreement might be either collective liability or individual depending on the conclusion in a negotiation stage between parties and public bodies.²⁸⁵ Collective liability, on the one hand, may take place when public bodies want all firms in a particular sector to conclude VEAs for reaching some specific goals, but in the event that those goals are not achieved, public bodies might introduce a stricter formal regulation for all firms in that sector.²⁸⁶ On the other hand, it might be possible that collective VEAs are based on individual liability. In this case, each of the parties has to monitor its compliance individually, and a firm failing to comply with the VEA obligations might be

²⁸³ Croci (n 252) 11.

²⁸⁴ *ibid*; Rasha Ahmed and Segerson Kathleen, 'Collective Voluntary Agreements and the Production of Less Polluting Products' (Economics Working Papers 2006) 3.

²⁸⁵ Börkey and Lévéque (n 243) 47.

²⁸⁶ *ibid*.

sanctioned individually. An example of sectoral VEAs under this rule is the covenants used in the Netherlands.²⁸⁷

Collective VEAs might be concluded or agreed between public bodies and individuals or firms or a group of those actors.²⁸⁸ Where this type of VEA is created between public bodies and a firm association, collective VEAs may not bind the members of such association, unless the members agreed to bind themselves due to the very nature of agreement running on a voluntary basis. However, the intention of a firm association to conclude VEAs might originate from the consensus of the firm association members. Hence, the intention expressed by a firm association might be representative of its members. In this circumstance, those consenting members are obliged to comply with the negotiated obligations. The agreement between the Walloon Region and the Cement Industry for Recovery of Waste²⁸⁹ implemented in Belgium is an example of a sectoral VEA. It was created in 1995, aiming at recommending that industry members conclude a subsequent agreement with the Walloon Region. This clause intended to induce the association's members to recover waste created by them by complying with the Region's plans of waste management. One of the incentives of entering into this VEA was that the Region, as a public authority, promised not to introduce stricter regulations without prior consultation. Also, collective VEAs can be found in the UK; for instance, the covenants concluded for pesticide control under the Pesticide Safety Precaution Schemes between government, manufacturers, and distributors implemented between 1957 and 1986.²⁹⁰

3.3 VEAs classified by their formation and content

The variety of arrangements falling under the term 'VEAs' not only makes its definition unsettled but also gives rise to the question of how each of them is different from others. Thus, it is worth examining how VEAs can be observed from the diversity of their formation and content. This section attempts to categorise VEAs into five

²⁸⁷ *ibid.*

²⁸⁸ For example, in Belgium, VEAs (both the sectoral and individual) might be created between (1) public bodies and various industries or an industrial sector; (2) public bodies and one particular firm; (3) the State and private parties; (4) Region and private parties; (5) the State, the Regions and private parties (ELNI (n 249) 199, 34).

²⁸⁹ *ibid* 202.

²⁹⁰ Gill Smith, 'Overview of the Regulatory Approach to the Use of Pesticides' (Advisory Committee on Toxic Substances Paper 2012).

specific groups. They range from voluntary agreements, voluntary public schemes, unilateral commitments recognised by a public authority, third party initiatives and private agreements. It is to be noted that although being distinctive in names, content and formation, the following VEAs have a common intersection as they are theoretically created as a result of the voluntary intention of participants, and share a mutual goal in dealing with environmental issues. Admittedly, the examination of this aspect might not make a significant contribution to the understanding of CAs themselves. Nonetheless, this study should be made to show how voluntary options, which share the same underlying concept as CAs, can come in many forms. As the study of CA-enabling laws in chapter 5 shows, CAs themselves, however, tend not to exploit this full variety.

3.3.1 Voluntary agreements between public bodies and firms/individuals

Voluntary agreements are the most crucial voluntary instrument for environmental protection that this thesis aims at investigating. This term represents all kinds of agreements regardless of their legal forms, legal status and legally-binding effect. Voluntary agreements in this meaning might be in the form of an agreement, covenant, contract or other names arising from a mutual agreement.²⁹¹ Although a simple agreement can be created with no qualification of its parties, voluntary agreements in this regard mainly focus on those made between public bodies and firms or individuals as they might be created as a result of statutory authorisation or fall under the term statutory VEAs summarised in 3.1 above.

It should be noted that a number of papers use the term ‘negotiated agreement’ to emphasise that this regulatory tool is a result of negotiation between public bodies and private actors to carry out activities. Nonetheless, this term might be flawed in that it is unable to include an agreement where an authorising statute already provides specific terms or content, and requires a prospective party to opt in to this type of agreement. In this sense, it seems that there is no obvious negotiation between the parties to conclude the form and content of an agreement.²⁹²

²⁹¹ Jutta Roosen and Andrea Ordóñez, ‘Voluntary Agreements and the Environmental Efficiency of Participating Farms’ (Paper prepared for presentation at the Xth EAAE Congress 2002) 3; Croci (n 252) 10-11.

²⁹² Although VEAs conclusion will arise from the fear that public bodies will introduce stricter regulatory burdens, this regulatory tool is considered as voluntary because private sectors still have a choice whether to enter into an agreement or allow the regulatory intervention occur and they are under no requirement to participate (ELNI (n 249) 27, 202).

3.3.2 Voluntary public schemes

Voluntary public schemes and voluntary agreements share a similar feature as they are created voluntarily, but the former is part of standardised schemes set by public bodies. This type of VEA enables individuals or firms to decide whether to participate in such schemes.²⁹³ Participants of the scheme are obligated to comply with the conditions of the scheme subject to a set of targets and monitoring provisions.²⁹⁴ This type of VEA may come together with specific forms of incentive,²⁹⁵ which include technical assistance, research and development help, or membership may enhance the reputation of the firms that are bound.²⁹⁶ The strength of this voluntary instrument is that it helps raise the environmental awareness of firms agreeing to comply with the plan.²⁹⁷ Voluntary public schemes are popular VEAs in the USA.²⁹⁸

3.3.3 Unilateral commitments recognised by a public authority

Unilateral commitments are an instrument whereby firms voluntarily create commitments to carry out particular activities in achieving a specific goal.²⁹⁹ The commitments creating obligations for firms might be created by their initiatives or by codes of practice of business associations.³⁰⁰ Many unilateral commitments used in western countries are introduced to encourage industrial and business sectors to deal with pollution and environmental issues. Since firms unilaterally start to commit themselves in carrying out certain activities, public bodies are not a counterpart of commitments³⁰¹ and all processes of compliance, e.g. setting the rules, monitoring and

²⁹³ Börkey and Lévêque (n 243) 39.

²⁹⁴ *ibid.*

²⁹⁵ Thomas P Lyon and John W Maxwell, 'Environmental Public Voluntary Programs Reconsidered' (2007) 35 *The Policy Studies Journal* 723.

²⁹⁶ Magali A Delmas and Ann K Terlaak, 'A Framework for Analysing Environmental Voluntary Agreements' (2001) 43 *California Management Review* 44, 47; John K Stranlund, 'Public Mechanisms to Support Compliance to an Environmental Norm' (1995) 28 *Journal of Environmental Economics and Management* 205, 222.

²⁹⁷ Delmas and Terlaak (n 296) 51.

²⁹⁸ Voluntary public schemes used in the USA are commonly introduced by the federal government or regional regulatory authority in the forms of programmes or initiatives. These schemes aim at inviting firms to participate. Examples of this type of VEAs in the USA are The 33/50, Energy Star and WasteWise programmes (Keith Brouhle, Charles W Griffiths and Ann Wolverton, 'The Use of Voluntary Approaches for Environmental Policymaking in the US' in Croci (n 252) 107).

²⁹⁹ *ibid* 108.

³⁰⁰ Madhu Khanna, 'Non-Mandatory Approaches to Environmental Protection' (2001) 15 *Journal of Economic Surveys* 291, 296.

³⁰¹ It might be questioned why this tool is explained under the concept of VEAs when it is a unilateral commitment by a private sector. It is true that this tool is initiated by firms unilaterally, not by a mutual commitment. But once it is recognised by public bodies, it becomes a consensus between firms and public bodies that such action is a good practice that should be put forward to meet an environmental enhancement goal. This is not different from the consensus made by public bodies and a private actor

enforcing, are operated by firms, not by a government authority. An example of this voluntary tool is ‘Responsible Care’, the policy instrument by which has been implemented in the USA for nearly three decades, and the ‘Global Environmental Management Initiative’ (GEMI) by the World Business Council on Sustainable Development.

3.3.4 Third-party initiatives

Third-party initiatives operate on a similar basis with unilateral commitments recognised by a public authority in the sense that firms or individuals intentionally bind themselves with certain commitments, but the framework of this voluntary instrument is usually designed by institutions that are not public bodies and participating firms, for example, ISO³⁰² or NGOs. The scheme may already be set for individuals or firms to adopt it. Third party initiatives usually have no financial benefit offered by a third-party or public authority in exchange for participation, but individuals/firms may get image benefits and access to management improvement procedures in return. An environmental management certificate (ISO 14000)³⁰³ issued for firms when they comply with the frameworks (requirements) of the standard for environmental management is an example of this voluntary tool.³⁰⁴

3.3.5 Private agreements

Private agreements refer to VEAs for which none of the parties is a governmental authority. Although it may not be classified as governmental regulation, private agreements may relate to the implementation of practices towards improving the

in non-statutory agreement that it has no legally-binding effect. It, therefore, should be categorised as a type of VEAs.

³⁰² ISO refers to the International Organization for Standardization. It is the international player established for providing various specific standards for compliance, including management standards for particular purposes. For example, ISO/TS 29001 is the quality management standards for petroleum, petrochemical and natural gas industries, and ISO/IEC 27000 family is the standards for information security management systems. There should be noted that ISO itself does not provide any certificates for the compliance meeting the standards. Firms seeking to receive a certificate for ISO standards for compliance must contact external certification bodies for obtaining the certification they want. (International Organization for Standardization <www.iso.org/home.html> accessed 14 May 2020).

³⁰³ ISO 14001 is an environmental management system introduced by ISO. It is the regulatory system that firms voluntarily agree to set their environmental management systems (EMSs) and environmental policy for dealing with environmental impacts resulting from their operations. Then such participating firms are obliged to comply with the policy and management system that they set. Such participating firms can obtain the ISO 14001 certification when an external institution (a third-party) approve that their management system and policy are consistent with the standard set by ISO (Coglianese and Nash (n 161) 249).

³⁰⁴ Under the ISO regime, firms are required to comply with the procedures and requirements set, aiming at achieving environmental management. This compliance is then reviewed by a third-party institution (Khanna (n 300) 297).

quality of the environment. Private agreements may be concluded between firms (or associations of these) which cause pollution and others who may suffer from pollution, viz. local inhabitants.³⁰⁵ This agreement can be illustrated by that implemented in Sweden. The Swedish Confederation of Professional Employees developed a model framework and encouraged industrial bodies to adopt it. It is called the ‘6E model’ (ecology, emission, efficiency, economy, energy, ergonomics).³⁰⁶ In principle, private agreements are created on the principle of equal bargaining power of private parties to undertake some tasks to achieve an agreed environmental goal. Nevertheless, one of the parties to an agreement (or contract) may be in a stronger position than another. One party may have more bargaining power than another and such high-bargaining power may exclusively stipulate the terms of an agreement.³⁰⁷ For example, a coffee shop owner may give a 30-pence discount for a takeaway coffee for customers who bring their coffee cup. In this circumstance, there is no equal bargaining power for this agreement because the coffee shop owner may make a unilateral decision whether to create this clause of a coffee sale contract.

It should be noted that a particular VEA may fall under multiple characterisations observed above. For example, the Green Lights and the Climate Challenge Program established in the USA in 1991, which aims to increase energy efficiency and reduce GHG emissions³⁰⁸ falls under a non-statutory VEA when it is considered from the involvement of the law. At the same time, it is a sectoral VEA and a voluntary public scheme when it is observed from a number of participants, and that from formations and contents respectively.

Another point worthy to note is about the features of CAs considered from the perspective of VEAs. In light of the legal characters of CAs defined in part 6 of chapter 1, it can be concluded that CAs are a subset of statutory VEAs, which are created for specific purposes for the conservation of natural or cultural heritage on land by landowners and governmental bodies. They can be distinguished from other VEAs which can be implemented for a broader purpose in relation to environmental matters. Such specific legal characteristics of CAs will be examined further in chapter 5.

³⁰⁵ OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes* (OECD Publishing 2003) 18.

³⁰⁶ OECD, *Voluntary Approaches to Environmental Policy: An Assessment* (OECD 2000) 14.

³⁰⁷ Richard Stone and James Devenney, *The Modern Law of Contract* (12th edn, Routledge 2017) 7.

³⁰⁸ Khanna (n 300) 294.

4. Reasons supporting the use of VEAs

As discussed in the following chapter, VEAs have not yet been adopted in Thailand, but there are reasons for the use of this tool which could support their adoption. Reasons supporting the use of this tool can be evaluated from many aspects illustrated as follows.

From the regulator's point of view, VEAs are a popular policy choice as they commonly generate a low level of confrontation between a regulator and those who are regulated. In some cases, the degree of imposing sanctions might be negotiable between public bodies and prospective participants during a negotiation process. This upside may look more attractive than the sanctions under direct regulation.³⁰⁹ Such low coercive enforcement, based on mutual agreement, is likely to be respected by participating firms or individuals as there is low resistance to comply with VEA obligations.³¹⁰ Also, it can be considered as a form of deregulation³¹¹ of government intervention on the one hand, and increasing self-regulation on another.³¹² This is because a private sector actor can take the initiative in creating technological innovation for achieving the goal. Also, because of this advantage, some writers support that the use of VEAs could save costs and efforts of implementation schemes or obligations compared with the use of formal regulation when VEAs are well designed.³¹³ This positive character constitutes the creation of a new relationship as a public-private partnership.³¹⁴

From the viewpoint of firms and individuals, VEAs are attractive for several reasons. Regulatory influence theory and market response theory argue that VEAs are beneficial for firms and individuals in many ways.³¹⁵ Firstly, participating in voluntary schemes may be a chance to reduce the risk of being regulated by unpredictable

³⁰⁹ Skjærseth (n 256) 59.

³¹⁰ Gunningham, Grabosky and Sinclair (n 2) 301.

³¹¹ As explained by Ogus, deregulation may involve the abolition of some controlling measures or the change to control a specific activity by employing low intrusive methods and forms (Ogus (n 99) 10).

³¹² *ibid* 301.

³¹³ David M McEvoy and John K Stranlund 'Costly Enforcement of Voluntary Environmental Agreements' (2010) 47 *Environmental and Resource Economics* 45; Delmas and Terlaak (n 296) 57-58.

³¹⁴ Peiter Glasbergen, 'Modern Environmental Agreements: A Policy Instrument Becomes a Management Strategy' (1998) 41 *Journal of Environmental Planning and Management* 693, 693-694.

³¹⁵ Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 *Journal of Law & Economics* 211, 212; Daniel J Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance' (1999) 23 *Harvard Environmental Law Review* 441, 449.

obligations in the future (regulation avoidance) as long as they comply with the obligation under VEAs.³¹⁶ Secondly, individuals or firms might participate in VEAs as it may help achieve possible practical solutions. On the other hand, VEAs are also cost-effective as they enable a target group to have freedom in considering the way to reach a goal rather than complying with a mandatory scheme.³¹⁷ Thirdly, private sectors may benefit from many VEAs launched by governments as sources of funding offering financial benefits for participants who want to invest in environmentally-friendly projects.³¹⁸ For example, Agri-environmental schemes under the CAP regime, used in many European countries, are an example of VEAs whereby farmers are encouraged to farm with eco-friendly practices. The subsidies under this tool are incentives in that participating farmers can get an additional income apart from selling their agricultural products.³¹⁹

5. Matters to be taken into account in creating VEAs

Although there are many reasons to support the use of VEAs, a number of conditions, limitations and challenging issues should be considered before public bodies and participants start implementing a particular VEA.³²⁰ This paper separates those matters into three parts, starting from the stages involved in the application of VEAs, the consideration of public involvement and the limitations of VEAs.

5.1 Stages involved in the application of VEAs

5.1.1 Preparation

Preparation of a draft of the VEA is important and should be considered here because a well-organised structure and content are critical to the success of VEA

³¹⁶ Segerson and Miceli (n 276) 130.

³¹⁷ Madhu Khanna and Lisa A Damon, 'EPA's Voluntary 33/50 Program: Impact on Toxic Releases and Economic Performance of Firms' (1998) 37 *Journal of Environmental Economics and Management* 1, 15.

³¹⁸ ELNI (n 249) 24; Croci (n 252) 12-17; Panagiotis Karamanos, 'Corporate Incentives for Participation in Voluntary Environmental Agreements' in Patrick ten Brink (ed), *Voluntary Environmental Agreements: Process, Practice and Future Use* (Greenleaf Publishing 2002) 52-56. This work provides the exhaustive categories of incentives for VEAs participation. They can be direct incentives, economic savings, strategic marketing, organisational culture or public recognition.

³¹⁹ Christopher Rodgers, 'Rural Development Policy and Environmental Protection: Reorienting English Law for a Multifunctional Agriculture' (2009) 14 *Drake Journal for Agricultural Law* 259, 264-265.

³²⁰ Wim Hafkamp, 'Covenants from Instrument of Environmental Policy to Implementation Tool' in Claude Jeanrenaud (ed), *Environmental Policy Between Regulation and Market* (Birkhäuser 1997) 263-265.

implementation. Many issues concerning preparation should be considered before the commencement of drafting a VEA. These include the preparation of the content of the draft, the process of inviting the public to participate in helping ensure transparency³²¹ and the consistency with the legal regime of each country. Examples of key points that should be considered in this stage are:

- ☐ Purposes of introducing VEAs;
- ☐ Details regarding the burdens of compliance;
- ☐ Considerations concerning the ability of participants to comply with the scheme, e.g. whether the participants can comply with the burdens in conforming with their business-as-usual trends in case that they are firms running the business;³²²
- ☐ Relevant legal and policy issues: whether VEA obligations conform to duties or legal requirements under C&C regulation and whether or not and to what extent the compliance under VEAs should go beyond the minimum requirements under the laws;³²³
- ☐ Impacts of compliance on third parties;
- ☐ Considerations of, as to how third parties and the public can participate in designing or implementing VEAs.

As will be justified in the opening paragraphs of chapter 5, these considerations will be employed to form the key legal matters used for the comparison of CA-enabling laws to develop a legal proposal for Thailand in chapter 6.

5.1.2 Negotiation

After the issues for a VEA draft have been prepared, the next step could be a negotiation stage, whereby interest groups can come to discuss how the issues that have been introduced for negotiation should be concluded. This stage could be divided into the negotiation between public bodies and private actors who are expected to be involved (in the case of public-private VEAs), and that between public bodies, private actors and the public. The extent, scope and period of this process might be varied

³²¹ Although concluding VEAs might partly arise from the intention of public bodies and private sectors to avoid the formal process of public participation during the process of preparing or implementing a formal legal regulation, this does not mean that public participation will hinder the implementation of VEAs. In contrast, public involvement can be used to help make the VEAs' preparation and implementation transparent.

³²² OECD, *Voluntary Approaches for Environmental Policy: An Assessment* (OECD 1999) 134.

³²³ *ibid.*

according to the detail of each VEA. The details of the public involvement in negotiation will be examined in due course in the following part.

5.1.3 Implementation and enforcement

VEAs' implementation is a process after the contracting parties agree with VEA terms, and such VEA starts to enter into force. As with a simple contract, VEAs are expected to be fulfilled by their participants, but they may have different details about the process of implementation and enforcement.³²⁴ Some may provide details for the implementation process, and the consequences where a breach of duty arises.³²⁵ However, this might not be the case for others, which could merely stipulate the content of implementation but not have clauses on non-compliance.

Another additional step commonly found in VEAs is monitoring. Monitoring in this context is an evaluative activity aiming at generating information, observing and tracking the compliance with obligations under the VEAs.³²⁶ It may also involve the consideration whether the participants comply with the duties stipulated in VEAs or not.³²⁷ Many papers point out that a monitoring process helps provide transparency and accountability for the VEA because it guides how each participant is required to fulfil their obligations and goal.³²⁸ A popular means of monitoring is self-monitoring, where all participants must track their compliance and report the progress to their counterparts or the third party in charge of tracking such self-monitoring.³²⁹ Examples of issues that should be considered for the process of implementation are a method of carrying out monitoring and measuring the success of compliance.³³⁰

As in many cases, parties to VEAs might fail to perform the obligations they have. The question here is whether such failures should be subject to any negative consequences

³²⁴ Reh binder (n 256) 261.

³²⁵ For example, VEAs made by the Ministry for Environment and Energy of Denmark explained in sub-section 3.1.1 above are the example of those where the statute stipulates detail regarding an implementation stage (see Environment Protection Act (No 1189 of 2016), s 10 (2)).

³²⁶ Johan Woltjer, 'Monitoring Environmental Agreements: A Multi-Level Conformity Approach. Sustainable Water Management in the Twente Region' in Brink (n 318) 429.

³²⁷ *ibid.*

³²⁸ OECD 1999 (n 322) 134; Storey, Boyd and Dowd (n 244) 15.

³²⁹ OECD 2003 (n 305) 85.

³³⁰ Margarita Mora and others, *Conservation Agreements: Field Guide for Design and Implementation* (Conservation International 2016) 13-14.

or not.³³¹ Many commentators support providing non-compliance clauses in VEAs.³³² In the case where a participating firm does not follow the requirement obliging the participants to reduce greenhouse gas emissions from their facilities, a non-compliance measure, such as the revocation of a financial benefit that they obtained due to joining the VEA for reducing greenhouse gases, should be applied. This measure is justifiable in the sense that providing negative consequences or penalties for non-compliance may help encourage participants to comply with the obligations.³³³ However, Skjærseth puts forward the opposite view, that penalties for non-compliance might be inconsistent with the underlying principle of creating voluntary agreements.³³⁴ This is on the ground that the voluntary agreements should not punish any members who fail to comply with the obligations under a voluntary agreement. Otherwise, it might not be different from obligations under a C&C regulatory approach.

The creation of enforcing measures for non-compliance may need to be initially considered at the stage of making a decision about the legal form and binding effect of a VEA. Where public bodies merely desire to encourage firms to do better than the minimum requirements of the duty under the law, a mere non-legally binding agreement may be sufficient. This is because this kind of agreement has no legally binding effect,³³⁵ and it is likely that target firms may not opt in to a scheme for better performance if they are coerced with a strong penalty measure. However, if public bodies seek to encourage firms to achieve a specific outcome in exchange for benefits, they might impose a measure for non-compliance, allowing public bodies to revoke incentives given to a participating firm.³³⁶ Another approach enabling VEAs to be enforceable might be to connect the obligations of VEAs with some conditions in the underlying legislation. For instance, if a participating firm fails to comply with VEA conditions, such a firm might have less chance to renew a permit for carrying out an activity linked to the condition stipulated in VEAs.³³⁷ This thesis will discuss further

³³¹ Klaus Rennings, Karl Ludwig Brockmann and Heidi Bergmann, 'Voluntary Agreements in Environmental Protection: Experiences in Germany and Future Perspectives' (1997) 6 *Business Strategy and the Environment* 245, 247.

³³² Giulio Volpi and Stephen Singer, 'EU-Level Agreements: a Successful Tool? Lesson from the Agreement with the Automotive Industry' in Brink (n 318) 148.

³³³ René Seerden, 'Legal Aspects of Environmental Agreements in the Netherlands, in Particular the Agreement on Packaging and Packing Waste' in Orts and Deketelaere (n 251) 181-183.

³³⁴ Skjærseth (n 256) 60.

³³⁵ Pim Hazewindus, 'The Integration of Covenants in the Dutch Legal System' (2000) 1 *Environmental Law Network International* 26.

³³⁶ Rennings, Brockmann and Bergmann (n 331) 247.

³³⁷ OECD 1999 (n 322) 135.

the need for, and the measures addressing, non-compliance for the breach of obligations in section 8.4 of chapter 5 and section 2.9 of chapter 6.

5.2 Public involvement

Although public involvement can be regarded as a process in the application of VEAs, it can be observed from another aspect as a key driver to the success of VEA implementation. It could help increase the confidence of the public towards the fairness and transparency of VEAs' preparation and implementation.³³⁸ Public involvement can be implemented in many forms and many stages of intervention. In some jurisdictions, third parties are invited to participate in the early phase of VEA preparation. In the Netherlands, for instance, the public is involved in the phase of setting the objective of VEAs.³³⁹ Another means of public involvement could be giving information concerning the preparation and implementation of VEAs.

Allowing participation by the public or third parties may have both upsides and downsides.³⁴⁰ On a positive side, this process helps make VEA preparation transparent. It also appears that implementing this process may influence participants to respect their commitments.³⁴¹

Nevertheless, public involvement may be disadvantageous for VEAs' implementation, and it might be more appropriate to avoid this process in preparation or implementation of some VEAs. It is possible that in some circumstances, negotiation to launch a new VEA might last a long period and prospective participants (e.g. firms) might not want to disclose their information to the public. In this situation, public participation might demotivate firms from being parties to VEAs. Additionally, it might appear that some voluntary deals for improving environmental qualities might not be popular, and this process might not be necessary, for example, the negotiation between public bodies and individuals to encourage them not to use plastic bags. In this scenario, the VEA negotiation is related to the encouragement to change personal behaviour. It might not need the process of asking the public whether they agreed with this VEA negotiation.

³³⁸ Patricia Bailey, 'The EIA Public Enquiry Procedure as A Model for Public Participation in Environmental Agreement' in Brink (n 318) 418-420.

³³⁹ John Moffet and François Bregha, 'An Overview Issues with Respect to Voluntary Environmental Agreements' (CAVA Working Paper No 98 1999) 27.

³⁴⁰ OECD 2003 (n 305) 85.

³⁴¹ OECD 1999 (n 322) 135.

Also, it may cause a delay in negotiation and increase the costs on both negotiating and implementing processes.³⁴²

5.3 Limitations of VEAs

Like other environmental regulatory tools, VEAs have both strengths and weaknesses. It is, therefore, necessary to identify their limitations. The findings observed in this section help this thesis set the scene for some discussions in chapter 5 in light of the limitations arising from the application of VEAs. Having investigated relevant literature, the following limitations are worth summarising here.

5.3.1 Problems arising from the voluntary characteristic

As VEAs are a voluntary and often negotiation-based mechanism, this may give rise to some defects that may affect the success of their implementation.³⁴³ The first obstacle is the difficulty in predicting the number of participants. This can be illustrated by the example of governments seeking to reduce the amount of plastic waste from households. This might be approached by banning the use of plastic or reaching an agreement with each family on voluntary waste reduction. Assuming that the second option is chosen, this way is likely to experience problems arising from the difficulty of predicting the outcome as there is nothing to provide assurance that a majority of people will participate in this voluntary agreement. This scenario illustrates that the success of VEAs' implementation will rely on the substantial involvement of firms or individuals who are eligible to enter into the agreement.³⁴⁴ The second problem might be the uncertainty of the rate of success. Although there are sufficient participants, VEAs' compliance might be at risk from failure to meet the desired outcome because it may difficult to predict whether or not the VEAs' compliance will achieve the goal. According to the scenario in the first issue, imagine there are 1,000 participants in the plastic use reduction agreement, agreeing to reduce the use by 50 percent compared to the proportion they used last month. It may be possible that some of those may be able to reduce by only 15 percent, and this figure represents the failure

³⁴² Allen Blackman and Janice Mazurek, 'The Cost of Developing Site-Specific Environmental Regulations: Evidence from EPA's Project XL' (2001) 27 *Environmental Management* 109, 114.

³⁴³ This limitation will be discussed further in the context of CAs in sub-section 3.4.3 of chapter 5 about the qualification of land to be under the conservation by CAs. It will be set as one of the factors in drafting a legal proposal for Thailand in section 2.1 of chapter 6.

³⁴⁴ Macrory (n 134) 634.

of achieving the goal. This is different from implementing a direct regulation tool to intervene in the actors' behaviour in the same activity, which is much more predictable.³⁴⁵

Some commentators observe that such problems could take place because there remains the gap of motivation for entering into particular VEAs between public bodies and prospective participants. In other words, the failure arises from the difference between the benefits of becoming a party to VEAs expected by prospective participants, and those that public bodies expect from introducing the VEA.³⁴⁶ This explanation can be illustrated by an example where a local government seeks to increase the number of trees in privately-owned land by proposing a VEA scheme to encourage landholders to sign a voluntary agreement to plant trees with a financial incentive. Landholders who have undeveloped property may be interested in this scheme, but those who already planned to develop their property to be golf courses might not want to join this initiative. This is because the benefit expected by the local government is to increase the trees but that sought by the latter group of landholders is to clear the land for creating more profitable golf courses. Another situation where VEAs might not be popular might take place where governments offer a proposal for negotiating a VEA to a group of firms that are intensely rivalrous. It might be possible that some of them may be reluctant to work with other firms who are their competitors and using a VEA in this situation may not be effective.³⁴⁷

5.3.2 Free-riders

Introducing VEAs in some cases may cause undesired effects, including the emergence of free-riders.³⁴⁸ This problem may affect the effectiveness of using VEAs. In sectoral VEAs, all participants are obliged to comply with a common burden towards achieving a particular goal. In order to meet a VEA goal, agreeing firms or individual complying firms bear the costs for compliance to achieve an overall goal while those other firms that opt-out of such a VEA have no such costs and burdens.³⁴⁹ In this situation, if such VEA implementation achieves the goal set by the parties, such success will be

³⁴⁵ Moffet and Bregha (n 339) 25.

³⁴⁶ Gunningham, Grabosky and Sinclair (n 2) 301.

³⁴⁷ Patricia M Bailey, 'Environmental Agreements and Compliance with the Treaty: Issues of Free Trade, Competition and State Aid' (2000) 1 Environmental Law Network International 57, 5.

³⁴⁸ Bent Ole Gram Mortensen, 'Voluntary Environmental Agreements between Private and Public Law' in Brink (n 318) 474.

³⁴⁹ Delmas and Terlaak (n 296) 53.

beneficial for all individuals or firms who are in such a sector. This means that non-participants in the VEA take some indirect advantages in the form of a positive externality. A high rate of free-riders will generate adverse effects on firms complying with a voluntary scheme.³⁵⁰ Some suggest that governments should introduce the law to prevent taking undue benefits of free-rider actors to avoid the distortions of competition resulting from a free-riding problem.³⁵¹ This consideration will be discussed in the context of a legal proposal of CAs for Thailand in section 2.10 of chapter 6.

5.3.3 Legally-binding status of VEAs

As mentioned in section 3.1, the considerations of whether and how CAs bind landowners and their successors in a land title interrelate to their legally binding status. Also, the examination in section 3.1 indicates the existence of two categories of VEAs, comprising those remaining legally-binding status and others having no legal status. It is worth discussing here whether proposed VEAs should be legally binding or not. Where there is no clarity on these issues, some problems of interpretation may arise. For example, lack of clarity in voluntary covenants in the Netherlands raises a question on whether they are legally binding and enforceable.³⁵²

Although many scholars support the recognition of the legal status of VEAs to ensure the enforceability of the agreements,³⁵³ several studies point out that stipulating legal enforcement may not be necessary as long as VEAs are functional in encouraging changing social behaviour. Additionally, such recognition may not guarantee any success in compliance.³⁵⁴ The case of VEAs in Germany illustrates their success in the implementation despite having no legally-binding status.³⁵⁵ Also, some writers point out that VEAs backed by statutes may demotivate prospective firms or individuals to join VEAs.³⁵⁶ There is evidence from European countries that the VEAs with recognised legal status under specific statutes are not agreed or are rarely used.³⁵⁷ Hence, acknowledging VEAs under a particular law might have both advantages and

³⁵⁰ *ibid.*

³⁵¹ Volpi and Singer (n 332) 148.

³⁵² Seerden (n 333) 190.

³⁵³ Reh binder (n 256) 268; ELNI (n 249) 126.

³⁵⁴ Pieter Glasbergen 'Agreements as Institutional Change' in ELNI (n 249) 87, 88.

³⁵⁵ Delmas and Terlaak (n 296) 77.

³⁵⁶ Reh binder (n 256) 268;

³⁵⁷ *ibid.*

disadvantages, and this issue should be considered before preparing or negotiating a VEA draft.

5.3.4 Conflicts among different interest groups

Although many people support VEAs as an alternative mechanism for regulation due to several advantages explained above, many others argue that implementing this tool may create many problems. This seems to be a point of tension between different interest groups. The first concern is about the lack of accountability and transparency of implementing VEAs.³⁵⁸ For example, some argue that VEAs enable an industrial sector to set the process and goal of public policy.³⁵⁹ Others point out that the negotiation process of VEAs usually tends to be conducted between prospective participants and public bodies, and the public and NGOs are excluded. Hence, this process is undemocratic, and it cannot ensure transparency of VEAs whether the compliance with VEA obligations can serve public benefits and affect the right of the third party or not.³⁶⁰ The way of solving this issue could be to invite individuals, communities and NGOs to participate in a case where VEA implementation will give rise to negative consequences to the public. In other words, public involvement, as mentioned in the previous part, is the process that can be used to mitigate this disagreement and make the preparation and implementation transparent. As the point about public participation and conflicts among different interest groups are extremely important for CA implementation, discussion on this point will be elaborated further throughout chapters 5 and 6.³⁶¹

5.3.5 High cost of negotiation and implementation

Although the use of VEAs, based on self-regulation, may lead to low monitoring costs from the regulator's point of view, many commentators argue that the cost of negotiation and implementation can match those of a C & C approach.³⁶² In a well-known example, the average costs of developing Project XL were over \$450,000 per

³⁵⁸ *ibid* 264.

³⁵⁹ EEA (n 246) 48.

³⁶⁰ *ibid* 49; Jillem Biekart, 'Environmental Covenants Between Government and Industry: A Dutch NGO's Experience' (1995) 4 *Review of European Community & International Environmental Law* 141.

³⁶¹ For example, they will be discussed in sub-sections 4.4.1, 11.4.2, and 12.4.2 of chapter 5, as well as sections 2.3 and 2.12 of chapter 6.

³⁶² Keith Brouhle, Charles Griffiths and Ann Wolverton, 'The Use of Voluntary Approaches for Environmental Policymaking in the US' (Working Paper Series, US Environmental Protection Agency National Centre for Environmental Economics 2004) 15; OECD, *Voluntary Approaches: Two Canadian Cases* (ENV/EPOC/WPNEP 2002) 10.

firm in 2001.³⁶³ Firms and the EPA bore this cost for nearly \$350,000 and \$100,000 respectively.³⁶⁴ This means that public bodies and firms should estimate whether the VEAs that they propose to push forward generate higher costs of preparation, negotiation, implementation or enforcement than those of direct regulation or not. Also, they might need to consider how the cost of negotiation and preparation can be reduced as well as to negotiate who should bear such costs.³⁶⁵

This part illustrates that VEA implementation should be done in light of various considerations throughout the stages of negotiation, drafting, implementation and enforcement. Public participation should be one of the matters to be taken into consideration. This suggests that the development and implementation of CAs, as the sub-form of VEAs, should consider those points observed in this part. This point will be further illustrated in chapter 5 whether and to what extent the laws of Australia, the UK and the USA have these legal requirements for CA implementation.

Conclusion

This chapter has highlighted many points interconnected with the investigation in the previous chapters and offered room to understand the application of CAs to be investigated in chapters 5 and 6. The noticeable points are as follows.

The main argument is that a CA is a sub-form of VEAs and there is room to observe CAs from theoretical and regulatory perspectives through the examination of VEAs.

The examination of definition, essential characteristics and roles of VEAs indicates several standard features of VEAs and CAs. For instance, while VEAs can be applied in a broader context of environmental regulation, CAs exclusively apply in the narrower context of natural or cultural heritage conservation.³⁶⁶ Additionally, while VEAs are within the meaning of the tools for regulation examined in chapter 2, they are generally distinctive from C&C regulatory tools in some aspects.³⁶⁷ However,

³⁶³ Blackman and Mazurek (n 342) 113.

³⁶⁴ *ibid.*

³⁶⁵ This point will be considered further in section 7.4 of chapter 5 in relation to the strengths and weaknesses of various approaches in relation to the binding durations of CAs.

³⁶⁶ This point will be observed in more details in chapter 5.

³⁶⁷ See sections 1.2 and 1.3 above.

VEAs can be a substitutive option of C&C regulatory tools or can work in combination with such mandatory measures.

The use of VEAs in many developed countries illustrates a wide range of purposes for which they have been implemented. Nonetheless, lack of statutory intervention begs the question of whether or not and to what extent non-statutory VEAs are enforceable against a party who violates VEA arrangements.

The categorisation of VEA typology offers an opportunity enabling this thesis to understand the application of voluntary tools in place in various jurisdictions from various aspects. It shows that voluntary agreements between public bodies and individuals or firms are one of the voluntary options under the umbrella term of VEAs and they can be, or may not be, backed by legal authorisation. Additionally, such voluntary agreements might be concluded individually or collectively between a group of firms and public bodies. Investigation of this point also offers the room to see the differences and similarities between CAs and other kinds of VEAs.

This chapter also points out what makes VEAs an appealing option from the regulatory point of view and in the opinion of firms and individuals. Nonetheless, where this policy choice is selected, many considerations should be made to ensure its efficiency and fairness of its implementation. This chapter overviews important points to be considered in each stage of VEA implementation. The last section highlighted what should be aware of the limitations of this regulatory tool.

As CAs are a sub-set of VEAs, this discussion points to the need not to overlook the limitations of VEAs that can arise at the various stages of negotiation, implementation and enforcement. The various aspects raised here will be discussed in more detail in the specific context of CAs in chapters 5 and 6.

Chapter 4 Land rights, land-use regulation and nature conservation in Thailand

Introduction

As stated in chapter 1, the primary purpose of this thesis is to explore the potential value and applicability of CAs and to analyse the room to develop a legal proposal for the establishment of this conservation technique in Thailand. This chapter seeks to investigate key existing problems and gaps, motivations for reform, and legal principles, which are relevant to the creation of CAs in the Thai context. After that, this chapter will attempt to draw some conclusions on how the existing facts about land use and environmental problems and the applicable laws may offer the room to develop a new legal tool to conserve features on privately-owned land.

A core argument is that understanding these factual and legal backgrounds will help this thesis establish the key problems that exist and might be solved by the implementation of CAs, and legal gaps that could hinder the implementation of CAs.

The first part of this chapter illustrates some factual issues about use of land in Thailand and key environmental problems arising from activities carried out on land, as well as the consequent potential of the use of CAs in Thailand. This point will also become the background for the consideration of whether and how Thailand should introduce a particular set of provisions for the creation of conservation agreements (CAs), as will be discussed in chapter 6.

The second part deals with the laws underpinning land rights and the regime in controlling the use of land and the conservation of nature. It shows how the laws in Thailand establish the legal rules and principles to manage land rights, the use of land and the conservation of nature. The examination in this part is not comprehensive but merely seeks to provide a fundamental picture of how the laws provide for the relationship between persons and the land.

1. Factual issues concerning agricultural land and the impacts of land use in Thailand

As mentioned in the beginning paragraph, it is worth examining some points about factual issues regarding land and activities carried out thereon. This part will be

divided into two sections, namely land use in Thailand at a glance and environmental issues arising from the use of land.

1.1 Land use in Thailand as a glance

Although the use of land can be divided into various categories by the purposes of its use, including for housing, manufacturing, tourism, agriculture, forestry and conservation purposes (as reserved areas), the use of land for agriculture and forestry should be emphasised in this study for several reasons. In the first place, the majority of the country's area is used for these ends.³⁶⁸ While nearly 46 percent of the area of Thailand is regarded as agricultural land,³⁶⁹ forestland, land designated both for reserved areas and for other forestry, accounts for a further 32 percent.³⁷⁰ Second, as mentioned in the opening paragraph of chapter 1, agricultural land and forestland are affected negatively by human activities, and there is room to conserve natural features in these two areas by a voluntary approach. Third, many activities operated on agricultural land are under fewer legal restrictions compared with other types of land use.³⁷¹ For instance, there is no requirement for assessing environmental impacts. This makes a myriad of agricultural practices beyond the control by environmental regulation.³⁷² This begs the question of whether a voluntary tool should be introduced to strengthen environmental governance in this sector. This question will be discussed further in part 1 of chapter 6.

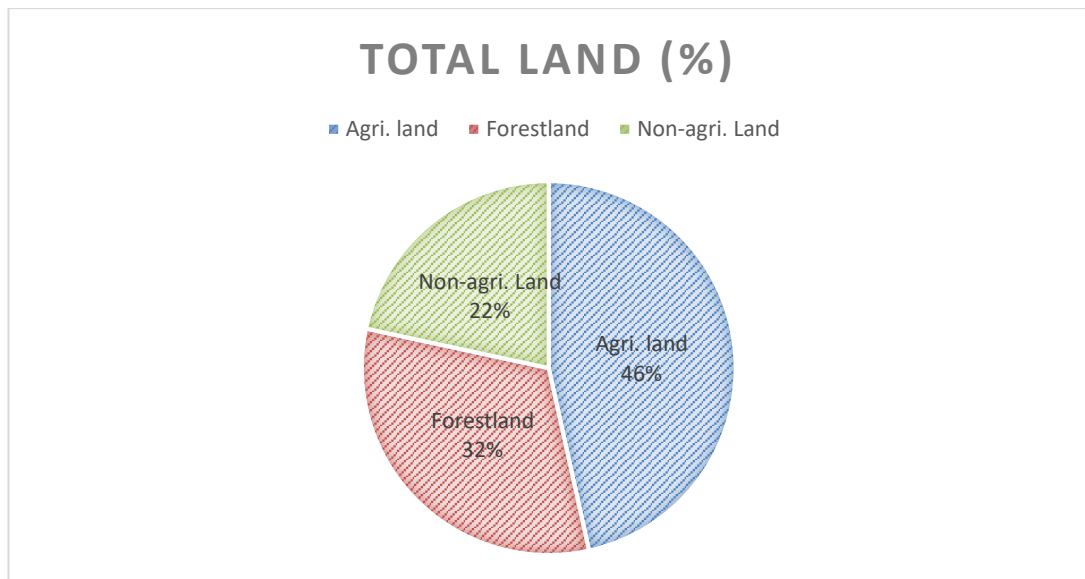
³⁶⁸ Office of Agricultural Economics, *Agricultural Statistics of Thailand 2018* (Office of Agricultural Economics 2018) 161.

³⁶⁹ The terms 'agricultural land' and 'farmland' remain undefined under Thai law. The absence of a legislative definition engenders the question of whether they merely refer to cropland or encompass pasture land and the land for afforestation. This thesis uses these terms in a broad meaning. Cropland, pastureland and land for afforestation are under the umbrella terms of 'agricultural land' or 'farmland'. See the discussion regarding the scope of agricultural land in Thailand in Surasak Boonrueang, 'The Development of a Legal Framework in Order to Implement a Conservation Agreement for Agricultural Land: A Preliminary Survey' (Academic article published in the proceedings for the 2nd National Conference Thammasat-Nitipat, Thammasat University 26 August 2017) 175-76.

³⁷⁰ Land Development Department, 'Land Use Types of Thailand in 2009-2012' <www.ddd.go.th/web_eng56/Land_Resources/Landuse_Data_in_Thailand/Land-Use-Types-of-Thailand.html> accessed 14 May 2020.

³⁷¹ Eathiphol Srisawaluck, *Agricultural law* (Chulalongkorn University Press 2014) 44.

³⁷² One of the difficulties in regulating agriculture-related activities arises from the fact that lots of farmers have low income and will suffer from restrictions on the activities they perform on farmland.



Pie chart illustrating proportion of land use from three categories³⁷³

Another point worth examining is the average size of parcels of land and farming activities carried out thereon. Farmland in Thailand is relatively small as an average size is about 25 Rai (4 hectares) for a family. Farmland sizes in the UK, USA and Australia are relatively larger.³⁷⁴

Agricultural activities in Thailand are varied subject to several conditions, viz. precipitation, location or soil quality.³⁷⁵ The majority of agricultural land (around 67 percent) is cropland (paddy land and upland field crop), and the rest of the land is used for horticulture and other purposes.³⁷⁶ While activities carried out on this type of land may cause many environmental impacts, they have not been fully regulated as will be examined in the next part.

The information about the area of farmland mentioned above could engender the question of whether a CA is appropriate for conservation on privately-owned land. The use of CAs to protect nature in a large area looks advantageous from many aspects. It is easier and cheaper to negotiate, create and monitor the land under a CA with a

³⁷³ Office of Agricultural Economics (n 368) 161.

³⁷⁴ The average sizes of farmland in the UK, USA and Australia were 63, 447 and 4,331 hectares respectively. See Department for Environment, Food and Rural Affairs and others, 'Agriculture in the United Kingdom 2017' (2018) 18; James M MacDonald, Penni Korb and Robert A Hoppe, 'Farm Size and the Organization of US Crop Farming' (ERR-152 Economic Research Service, USDA 2013) 5; Australia Bureau of Statistics, '7121.0 - Agricultural Commodities, Australia, 2015-16' <www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/7121.02015-16?OpenDocument> accessed 14 May 2020; Office of Agricultural Economics (n 368) 160.

³⁷⁵ Chavalvut Chainuvati and Withaya Athipanan, 'Crop Diversification in Thailand' <www.fao.org/3/x6906e/x6906e0c.htm> accessed 14 May 2020.

³⁷⁶ Office of Agricultural Economics (n 368) 166.

landowner having a large land plot than to do these tasks with several landowners having small pieces of land. Nonetheless, the success in implementing CAs in the context of the jurisdictions having small land plots might be slightly different from those having larger plots of land. In the first place, the use of C&C regulation may encounter difficulty in enforcing legal measures against lot of small farmers.³⁷⁷ This regulatory challenge suggests an opportunity to use a voluntary approach to encourage land conservation. It is true that if CAs were to be used for small farms, there might be some difficulty in enforcing against those owning or occupying such small farms where they breach CA obligations. The experience from other jurisdictions, including Australia, reveals however that the governance of CAs for local farms could be strengthened by building capacity and creating networks among those small-scale farmers to help and look after each other.³⁷⁸ This could be advantageous in avoiding non-compliance or the breach of CA obligation. Second, the success in employing CAs for conserving small-scale farmland may reveal itself not only in the increase in the diversity of species and environmental quality on land but also in the encouragement of private-land stewardship by individuals. It is true that the change in behaviour of landowners in how they treat the land not only helps improve the health of ecosystems and workers' well-being but also can change attitudes of farmers to change the environmental impacts resulting from activities in their daily life.³⁷⁹

1.2 Key environmental problems, socio-economic factors and the potential use of CAs

Similar to other jurisdictions, Thailand has encountered several environmental problems arising from various human activities. These problems are complex and have been influenced by socio-economic conditions. These considerations are crucial for this study because it is crucial to understand what are the problems that CAs might be used to solve. The primary purpose of this examination is to exemplify key problems

³⁷⁷ Gunningham, Grabosky and Sinclair (n 2) 275.

³⁷⁸ See Charlie Zammit, 'Landowners and Conservation Markets: Social Benefits from Two Australian Government Programs' (2013) 31 Land Use Policy 11; Chris Harrington and others, 'Learning Conservation: The Role of Conservation Covenants in Landscape Redesign at Project Hindmarsh, Victoria' (2006) 37 Australian Geographer 187.

³⁷⁹ See comprehensive details on how the encouragement of landowners to participate in land stewardship schemes can influence the change in their behaviour towards the increase in environmental awareness in Inga Račinska, Lynne Barratt and Christina Marouli, 'LIFE and Land Stewardship: Current Status, Challenges and Opportunities' (Report to the European Commission 2015) 76-84.

that governments could employ CAs to deal with. The last part of this section will provide some scenarios where CAs could come into play.

1.2.1 Major environmental problems

The activities carried out on agricultural land are complicated and driven by several causes. The following issues illustrate the problems arising from human activities on agricultural land in Thailand, and that could be tackled by the use of CAs.

The first illustration is biodiversity loss, floods and droughts resulting from land clearing and deforestation. The demand for land for farming commonly involves the change of physical features of undeveloped land to serve specific types of farming. Different farming practices generate various levels of environmental consequences.³⁸⁰ Clearing forestland for cropping has taken place in all areas for centuries. The change of land-use patterns from woodlands or undeveloped land to land for mono-cropping and tourist resorts is also significant among other activities.³⁸¹ These activities contribute to several problems, including the loss of forestland and biodiversity, as well as being major causes of floods in the wet season and water shortage in the dry season.

The second type of problems is global warming and climate change from greenhouse gas emissions. The emission of anthropogenic greenhouse gases, e.g. carbon dioxide, is widely accepted as a major cause of climate change.³⁸² The primary source of the emission is that from rice grown in wet fields, and the planting process which generates methane,³⁸³ one of the greenhouse gases. Land clearing and burning after a crop harvesting period also contribute to carbon dioxide emissions to the atmosphere. In 2013, the agricultural sector in Thailand emitted around 22 percent of the country's carbon dioxide emissions.³⁸⁴ The open burning of residues after harvesting crops in farmland, which has been a traditional means in preparing farmland for the next

³⁸⁰ See several environmental impacts from different agricultural practices in Food and Agriculture Organisation of the United Nations (FAO), 'World Agriculture: Towards 2015/2030; Summary Report' (FAO 2002) 75-77.

³⁸¹ ONEP (n 14) 14.

³⁸² Greenhouse gas emission is a contribution of global warming and climate change as recognised in the Paris Agreement (Paris Agreement (Paris Agreement to the United Nations Framework Convention on Climate Change, art 2, 12 December 2015, entered into force 4 November 2016).

³⁸³ FAO (n 380) 78.

³⁸⁴ ONEP, *Second Biennial Update Report of Thailand* (ONEP 2017) 33.

planning season,³⁸⁵ also engenders air pollution.³⁸⁶ Although the emission from the agricultural sector is relatively lower than that from energy and industrial sectors,³⁸⁷ there is room to mitigate the emission of greenhouse gases from agriculture by encouraging the use of CAs to encourage nature-friendly practices.

The last set of environmental problems are soil degradation and land contamination. This partly results from intensive agricultural methods intending to maximise yields without appreciating the environmental impacts on land and ecosystems.³⁸⁸ Land mismanagement by farmers contributes to agricultural land degradation.³⁸⁹ There are many circumstances where farmers might unknowingly degrade soil quality. For example, monocropping and the use of chemical fertilisers are essential causes.³⁹⁰ Planting intensive and short-life crops demands a high rate of artificial fertilisers, and degrades the quality of soil.³⁹¹ At the same time, soil erosion takes place when there is sparse vegetation covering the land after farmers harvest their crops. Wind and rain, consequently, wash the land surface into waterways.³⁹² Regarding land contamination, it is evident that an enormous amount of pesticides and fertilisers are used in farming processes and the amount is considerably increasing.³⁹³ This is because the rates of damage arising from pests, weeds and diseases in farmland in Thailand, which is located in a tropical zone, are higher than those in other areas. As a result, the majority of farmers use these chemicals to help them eradicate pests, weeds and diseases as well as to maximise nutrients for their crops. However, the side-effects of the chemicals are

³⁸⁵ Kanittha Kanokkanjana, Penwadee Cheewaphongphan and Savitri Garivait, 'Black Carbon Emission from Paddy Field Open Burning in Thailand,' (2011) 6 International Proceedings of Chemical, Biological and Environmental Engineering 1.

³⁸⁶ Agapol Junpen and others, 'Emission of Air Pollutants from Rice Residue Open Burning in Thailand' (2018) 9 (11) Atmosphere 449, 450.

³⁸⁷ ONEP (n 384) 27-42.

³⁸⁸ Chawalit Hongprayoon, Nongkran Maneevon and Audthasit Wongmaneeroj, 'Land Resources in Thailand'

<www.fao.org/fileadmin/user_upload/GSP/docs/asia_2015/Thai_ASP_presentation_%E0%B8%8A%E0%B8%A7%E0%B8%A5%E0%B8%B4%E0%B8%95_compressed_3.pdf> accessed 14 May 2020.

³⁸⁹ FAO (n 13) 75.

³⁹⁰ The problems about land degradation and contamination arising from agriculture have been addressed as a challenging issue in several versions of the Thai National Economic and Social Development Plans. See Office of the National Economic and Social Development Board (NESDB), 'The Twelfth National Economic and Social Development Plan (2017-2021)' (NESDB 2017) 58.

³⁹¹ It appears that the use of chemical fertilisers for a long time can affect the friability of soil, and this prevents rainwater from entering the soil. At the same time, chemical fertilisers can reduce the number of beneficial microbes in the soil (World Agriculture, 'Disadvantages of Chemical Fertilizer' <www.agrotechnomarket.com/2014/07/disadvantages-of-chemical-fertilizer.html> accessed 14 May 2020).

³⁹² Martial Bernoux and others, 'Cropping Systems, Carbon Sequestration and Erosion in Brazil: A Review' in Eric Lichtfouse and others (eds), *Sustainable Agriculture* (Springer 2009) 83.

³⁹³ Apiwat Tawatsin, Usavadee Thavara and Padet Siriyasatien, 'Pesticides Used in Thailand and Toxic Effects to Human Health' (2015) 3 Medical Research Archives 1, 1-2.

varied. For example, nitrates in chemical fertilisers are leached into rivers and cause eutrophication.³⁹⁴

1.2.2 Socio-economic conditions contributing to the environmental problems

The problems exemplified in sub-section 1.2.1 above are the result of the complexity of social and economic-related problems, which should not be overlooked. It might be easy to allege that the poor clear forestland for agriculture, use pesticides which cause land contamination and generate greenhouse gases by open-burning. Nevertheless, the motivations for such actions are varied, and the problems arising from poverty and commercialisation of agriculture are worth addressing here.

Poverty is one of the factors inducing the poor to harm the natural environment.³⁹⁵ This is witnessed by the famous speech of Indira Gandhi, former prime minister of India, given in the United Nations Conference on the Human Environment (Stockholm Conference) in 1972.³⁹⁶ Gandhi emphasised the basis of environmental problems in developing countries through the sentences ‘are not poverty and need the greatest polluters?’ and ‘poverty is the greatest polluter’.³⁹⁷ In Thailand, this linkage is mixed with the trend towards the commercialisation of agriculture, leading to the problems noted in the previous sub-section.³⁹⁸ The transition of agriculture in Thailand from subsistence agriculture to intensive farming was apparent after the implementation of the first National Economic and Social Development Plan in 1961. The targets set for the agricultural sector highlighted the importance of maximising, among other things, crop yield and agricultural land to increase the productivity and income of the farming population.³⁹⁹ This can be seen as the commercialisation of agriculture which helps farmers generate income, but on the other side, it comes along with environmental problems and socio-economic difficulties. The overuse of agricultural chemicals generates farming costs, and it consequently gives rise an increase in household debt.

³⁹⁴ Eutrophication is a phenomenon where the nutrients increase and induce the growth of algae or other plants. It finally results in the drop of dissolved Oxygen in the water.

³⁹⁵ Yves Le Bouthillier and others (eds), *Poverty Alleviation and Environmental Law* (Edward Elgar 2012) 1.

³⁹⁶ United Nations, ‘Report of the United Nations Conference on Human Environment’ (A/CONF.48/14/REV.1, Stockholm, Sweden, June 5-16, 1972) para 128.

³⁹⁷ Jairam Ramesh, ‘Poverty Is the Greatest Polluter: Remembering Indira Gandhi's Stirring Speech in Stockholm’ <<https://thewire.in/books/indira-gandhi-nature-pollution>> accessed 14 May 2020.

³⁹⁸ Chainuvati and Athipanan (n 375).

³⁹⁹ Government of Thailand, ‘National Economic and Social Development Plan (Phase 1) 2504-2506 BE (1961-1963)’ 43.

It is estimated that expenses related to chemicals account for half of all farming costs.⁴⁰⁰

1.2.3 The potential use of CAs

The problems and factors examined above emphasise that CAs could come into play as a legal option in mitigating or solving those problems in many situations. For instance, governments may introduce a short-term CA scheme to support conversion to organic farming. The scheme may involve the encouragement of farmers not to use pesticides and chemicals, coupled with advice on how organic farming can be conducted. CAs would thus be the vehicle for a conservation scheme playing a part in reducing land contamination and land degradation, as well as providing support the conservation of biodiversity. Alternatively, this legal tool could be used on a longer-term basis to motivate landowners to plant native trees instead of growing a monocrop, thereby securing biodiversity as well as storing greenhouse gases. The implementation of these schemes would also help the Thai government to deal with socio-economic conditions mentioned above, if the schemes were to be supported by public money, coupled with a well-organised policy, enabling land to produce an income without it being devoted to maximising agricultural production. These conservation schemes are possible since several national policies already support the initiation of conservation schemes for organic farming.⁴⁰¹

2. Fundamental legal principles and rules

This part examines the established legal rules and principles of land rights, land-use regulation and nature conservation. Section 2.1 will mainly summarise how the law sets the legal rules connecting the state and people with land through the concepts of land rights. Section 2.2 reflects whether and how the law lays down rules, principles or measures to intervene in the use of land, and for nature conservation. This section will be examined from the perspective of environmental regulation.

The merits of the examination in this part are that first, it helps to provide the legal background of the established regime in Thailand, and reflects whether such legal rules

⁴⁰⁰ Tawatsin, Thavara and Siriyasatien (n 393).

⁴⁰¹ See NESDB (n 390) Strategy 3 (Strategy for Strengthening the Economy, and 102 Underpinning Sustainable Competitiveness); ONEP (n 14) policy 1.1.

are sufficient to deal with the problems exemplified in part 1 above or not. Second, it will be used to identify the strengths and weaknesses of the existing regime to be discussed in chapter 6.⁴⁰²

2.1 Land rights under property law and land law

Land is regarded as property under property law.⁴⁰³ This area of law sets a legal relationship between persons and things, as well as the rules regarding, inter alia, the acquisition of property rights in real property.⁴⁰⁴ Although this thesis is not a comprehensive study on this point, several legal considerations under property law are necessary to the understanding of what the existing legal rules regarding the use of land are, and how CAs can become a part of such rules. This section is divided into four sub-sections, starting from the legal definition and legal status of land. Then consideration of the concepts of property rights, fundamental property rights and the relationship between types of land and land rights will be examined respectively.

2.1.1 Legal definition and legal status of land

The law giving the meaning of land is the Land Code.⁴⁰⁵ The Land Code defines land with a descriptive approach as the land surface everywhere and includes mountains, hills, streams, ponds, canals, swamps, marshes, waterways, lakes, islands and the sea coast. Thus, the earth's surface, whether it is wet or dry, comes under the meaning of land.⁴⁰⁶

Another consideration to be noted here is about the legal status of land. The Land Code enunciates that land which is not vested in any person shall be deemed the property of the state.⁴⁰⁷ This legal rule constitutes two categories of land tenure, comprising

⁴⁰² See section 1.2 (limitations of the existing legal regime) of chapter 6.

⁴⁰³ In the Thai legal system, the legal rules about land (immovable property) can be found both in the Thai Civil and Commercial Code (Book 4: Property), and the Land Code. The first provides general rules about the definition of immovable property, the acquisition of ownership and other property rights, and the rules regarding the exercise of those rights. The latter provides explicitly the rules on how, among the other things, the law stipulates specific rules, conditions and procedure for the issuance of land title documents.

⁴⁰⁴ Seni Pramroj, *Commentary on the Civil and Commercial Code: Law on Property* (The Thai Bar Association 2008) 3.

⁴⁰⁵ Land Code BE 2499 (1956), established by the Promulgating of the Land Code Act, BE 2497 (1954).

⁴⁰⁶ Land Code, s 1.

⁴⁰⁷ *ibid* s 2.

privately-owned and publicly-owned land.⁴⁰⁸ Although the Land Code provides a clear division between these types of land, it is not an easy task to determine whether the land in question is publicly-owned land and whether people or communities can use that land due to the fragmentation of laws establishing land rights.

As the Thai land law, mentioned above, provides a broad definition of land and categorises the land into two groups, these imply that CAs as an instrument for land conservation could be implemented to conserve several areas, but there must be considered further whether CAs should be used for all or some types of land, as will be discussed in section 2.4 of chapter 6.

2.1.2 Land from a property law perspective

The examination in the previous sub-section explains what the Land Code provides the legal meaning and legal status of land. This sub-section further examines how the general rules of property law govern land. It mainly focuses on the examination of the rules established under the Thai Civil and Commercial Code (CCC),⁴⁰⁹ specifically the key aspects of property rights⁴¹⁰ on land under the law on property (Book 4).⁴¹¹ The aim of this discussion is to illustrate the default existing rules of property rights that can be established on land. This examination will help this thesis justify why they are insufficient for the creation of CAs, which will be discussed in part 1 of chapter 6.

Apart from the definition of land under the Land Code, land falls under the broad concept of ‘immovable property’ under CCC. This law gives its legal meaning as land and things fixed permanently thereto or formed as a component part thereof. It also

⁴⁰⁸ This categorisation will be employed to determine the types of eligible land subject to CA, as will be exhaustively examined in chapter 6 regarding the legal proposal for Thailand. The legal features of these categories of land will be examined further in sub-section 2.1.4 below.

⁴⁰⁹ The Civil and Commercial Code (CCC) was an outcome of the attempts to modernise the Thai legal system during the reign of the King Rama V. The legal rules under CCC are divided into several books, parts and sections. The books range from the law on Persons, Obligation, Specific Contracts, Property, Family and Succession, respectively. The majority of the legal principles in CCC, except for the law on family and succession, are influenced by the law of continental countries rooted from the Roman law. CCC was initially drafted by adopting and copying the provisions of the civil law of western countries, i.e. Germany, Switzerland, Italy and France (Sawaeng Boonchalermvipast, *The Thai Legal History* (12th edn, Winyuchon 2013) 230-240).

⁴¹⁰ Although the core meaning of property rights remains unclear, the words ‘property rights’ and ‘real rights’ used in this chapter refers to a group of rights established by the law, for example, ownership, servitudes or mining concessions. Holding a specific real right entitles certain persons or communities to enjoy the benefit of a particular property, and they must be somehow related to a specific property. In this sense, the right to farm on the land of another is a property right. Several laws establish various property rights, but the most well-known property rights are set up by the law on property under CCC.

⁴¹¹ The term ‘property law’ will be used throughout this thesis to reference to the law on property under CCC.

includes real rights connected with the land or things attached to or forming a body with the ground, for example, servitudes and usufructs.⁴¹² This definition makes immovable property encompass the physical features as well as the property rights attached to the land.

Another notion relating to the property rights on land is a ‘component part of a thing’. This concept provides the legal rules on how one thing can be connected to another. A component part is defined as a thing which, according to its nature or local custom, is essential to the existence of another. It cannot be separated without destroying, damaging or altering its form or nature. Due to the very nature of a component part, an owner of the immovable property owns all component parts attached to the immovable property.⁴¹³ Trees in a particular plot of land, for instance, are regarded as the component parts of that land, and the landowner is the owner of trees accordingly. However, CCC provides an exception that plants which grow only for a short life-span (shorter than three-year-old) and crops which may be harvested one or more times a year are not fixtures of the land.⁴¹⁴

The definitions of immovable property and component parts described above are essential in that they set the scene on whether and how the things regarded as immovable property can be an object for the establishment of any specific type of property rights. Those rights that can be created on immovable property, specifically on agricultural land, are to be summarised in the next sub-section.

2.1.3 Key property rights on land

This sub-section is not a comprehensive explanation about property rights under property law but instead seeks to overview the property rights that can be established on agricultural land.

2.1.3.1 Privately-owned land ownership

Ownership is the most important real right as it entitles a person to own property, including land. An understanding of ownership is also critical for this study because it determines who can be a landowner, entitled to enter into a CA with an eligible body (a CA holder). CCC does not state what ownership is but recognises how a proprietor

⁴¹² CCC, s 139.

⁴¹³ *ibid* s 144.

⁴¹⁴ *ibid* s 145.

enjoys ownership. The specific bundle of rights conferred on an owner of property encompasses the right to use and dispose of property; right to acquire its fruits; right to revindicate the property from any person not entitled to detain it; and the right to prevent unlawful interference with it.⁴¹⁵

The acquisition of private-land ownership remains different from that of movable or personal property in various aspects. In the first place, its validity is subject to several legal requirements. The acquisition of landownership by agreement, for instance, requires the registration of the transfer from a previous to a new landowner in a land title deed or other comparable land documents.⁴¹⁶ A contract made for transferring land ownership must be made subject to the rules provided in CCC, for example, a contract of sale must be fulfilled in the form of writing and registered in a land title deed.⁴¹⁷ This means that a person seeking to buy land must enter into such a contract and register such transfer of the land at the land registry. Second, the acquisition of land ownership can be made by other means, including acquisitions by prescription (adverse possession) and the acquisition of land resulting from *alluvion*. However, these types of acquisition are out of the scope of this thesis.⁴¹⁸

Ownership is different from other real rights in that it is never exhausted by abandonment by the proprietor. However, owners might lose ownership in some circumstances. For instance, if they are deprived of possession by another person for a period, the new possessor may acquire the ownership of that property through acquisition by prescription explained above.

2.1.3.2 Possessory right over private property

A possessory right under CCC denotes a property right over a certain piece of property, including the right over real property. The content of a possessory right under CCC remains unclear as to what extent a possessor is entitled to exercise any rights over the thing being held. CCC merely admits that the possessor has the right to transfer the thing, to eliminate unlawful interference and to return to possess a specific thing where the possessor is unlawfully deprived of possession. As s 1368 of CCC recognises that a person may acquire a possessory right through another person holding for him, some

⁴¹⁵ *ibid* s 1336.

⁴¹⁶ *ibid* s 1299.

⁴¹⁷ *ibid* s 456

⁴¹⁸ See the legal rules on the acquisition of ownership by prescription and the acquisitions of land resulting from *alluvion* in *ibid* ss 1308, 1382-1385.

scholars interpret this provision that both the lessor and lessee have a possessory right to the property leased.⁴¹⁹ For instance, where A owns a specific plot of land and leases out the plot to B, A, as a lessor, has a possessory right on the land because B holds the land for their behalf and will return it to them.⁴²⁰ The consideration of possessory rights over certain land is crucial for this thesis because it is worthy of discussion whether a lawful occupier of land, other than the landowner, should be eligible to enter into CAs. This consideration will be examined and discussed further in section 5.4 of chapter 5 and section 2.6 of chapter 6.

2.1.3.3 *Servitudes*

A servitude is a property right that can only be established on parcels of land held as different properties and mainly creates restrictions on one land plot for the benefit of another. The rule under CCC provides that an owner of a particular piece of property (called the ‘servient property’) is bound to allow another landowner to do specific activities on the servient property for the sake of another immovable property (called the ‘dominant property’).⁴²¹

Servitudes can be formed by signing and registering a servitude agreement and by legal force (prescription). The former can be made when the parties as owners of different land plots reach an agreement. It can be done where the servient owner accepts an obligation to refrain from exercising certain rights inherent in his ownership.⁴²² For instance, a servient landowner may allow a dominant landowner to walk through the servient property to a river to draw water for the use for farming in the dominant property. However, the agreement for creating a servitude must be recorded in a land title deed and registered at the state land office to enable a servitude to be enforced against a successor of servient property.⁴²³

Unlike other contracts, a servitude created by a contract runs with the land and binds future owners. The binding duration might be time-limited or indefinite. The other means of creating a servitude on the land is the creation by prescription in a similar

⁴¹⁹ Viriya Ngamsiripongphan, *Commentary on the Civil and Commercial Code Book 4: Law on Property* (Dauentula Press 2014) 69.

⁴²⁰ B, as a lessee, has an obligation according to the contract to return the land to A when the period of lease is terminated.

⁴²¹ CCC, s 1387

⁴²² *ibid* s 1387.

⁴²³ *ibid* s 1299.

vein as the acquisition of landownership by prescription.⁴²⁴ The servitudes created by this means are different from those made by agreement in that they run with the servient land in perpetuity.

As will be explained in section 1.2 of chapter 6, servitudes are the legal instrument having a similar function as CAs. However, the current Thai law does not allow the creation of servitude to impose positive obligations on servient landowner. This is not the case for CAs, which can impose both positive and negative burdens to run with the land in perpetuity.

In terms of the duties of a dominant landowner and a servient one, once the servitude has been established, the owner of the dominant property is not entitled to make any change, either on the servient or on the dominant property, which increases the burden of the servient property.⁴²⁵ Also, the owner of the servient property must refrain from any act which will tend to diminish the utility of the servitude or to make it less convenient.⁴²⁶

A servitude may involve agricultural land uses in some circumstances. For example, a landowner, who has been crossing cropland owned by another to transport harvested crops during the harvesting season for ten years, is entitled to a servitude to cross the land for moving such crops even though they do not have permission from the owner of the servient land.

2.1.3.4 Superficies

Superficies is another kind of property right that can be found on farmland. It is the right, granted by an owner of a piece of land to another person to permit such a person to own buildings, structures or plantations, upon or under the land, by registering the contract establishing this right.⁴²⁷ It might be questionable whether this right is the same as that generated by a lease agreement. They are different because superficies is valid when an establishing agreement is made in writing and registered with the competent authority, and a superficies contract might not require any consideration; a lease agreement, on the other hand, does not necessarily require registration, but

⁴²⁴ *ibid* s 1401.

⁴²⁵ *ibid* s 1388.

⁴²⁶ *ibid* s 1390.

⁴²⁷ *ibid* s 1410.

consideration is needed.⁴²⁸ Other characteristics of this right are that the right of superficies is transferable and transmissible by way of inheritance unless the contract does not allow this.⁴²⁹ Also, it may be created either for a fixed period or for the life of the owner of the land or the superficiary.⁴³⁰ It should be noted that several provisions in CCC imply that servitudes and superficies can be created only in limited circumstances, e.g. the land affected must be privately-owned land.⁴³¹ This is because the property rights established under CCC are exclusively related to the concept of private ownership. Therefore, it would appear that the government cannot use public land to create these property rights.

2.1.4 Interconnection between types of land and land rights

As just mentioned, publicly-owned and privately-owned land are clearly divided, but the extent to which publicly-owned land can be utilised remains complex. This part illustrates how people can use each type of land. The understanding in this sub-section will help this thesis examine and discuss further in chapters 5 and 6 whether these two kinds of land should be the subject for the creation of CAs.

2.1.4.1 Privately-owned land

Privately-owned land is land where an individual is legally entitled to use and transfer the land. According to the Land Code, privately-owned land can be split into land subject to full ownership and that where the holder has merely a possessory right.

Regarding the privately-owned land with full ownership, a current rule recognising who owns a specific parcel of land is the use of a land title deed. The transfer of ownership of the land for which the title deed has already been issued must be made in writing and registered with the competent officials.⁴³² The privately-owned land with a possessory right, on the other hand, is the land over which people have not yet acquired full ownership, but which they are entitled to possess and utilise in the same manner as those who hold a title deed. The certified document is called a utilisation certificate. In practice, a holder of this certificate is recognised as a landowner having a possessory right. This type of property can be changed to be full-ownership land

⁴²⁸ A consideration for a lease agreement is required in the form of a rental fee. See *ibid* s 537.

⁴²⁹ *ibid* s 1411.

⁴³⁰ *ibid* s 1412.

⁴³¹ For example, CCC, ss 1387 and 1410.

⁴³² Land Code, s 4/1.

when the holder files a request to the competent authority to remeasure the land plot and to change a type of certification. The transfer of this type of land to another person follows similar rules to the transfer of full-ownership land.

As privately-owned land is considered as private property, landowners can utilise, dispose of or sell the land, obtain its fruits and exclude others, as they can for other kinds of goods. Some restrictions may be applied to freehold land, e.g. the duty to pay a land-related tax and the transfer of property must be in writing and registered with the competent officials. The use of land, in general, is under a few legal restrictions.⁴³³

2.1.4.2 *Publicly-owned land*

Publicly-owned land in Thailand covers all areas other than privately-owned land. It is considered as the property of the state by virtue of the Land Code s 2 mentioned above. This means that the law vests the power in government agencies to preserve, protect, conserve or use publicly-owned land according to the conditions prescribed by the laws concerned. However, the government cannot sell or give publicly-owned land to anyone unless allowed by the law.⁴³⁴ This type of property can be divided into the land which the authorities are empowered to allow institutions or people to use for certain purposes prescribed by laws, and other cases where it is public domain land.⁴³⁵

For the first category, several pieces of legislation entitle individuals or institutions to use publicly-owned land. Those laws usually empower state institutions to manage the land, and those competent institutions may authorise people who have suitable qualifications to use the land. The right to use this type of land can be for a limited time or without limited period subject to the conditions and purposes of the laws. For instance, the Agricultural Land Reform Act BE 2518 (1975) authorises the Agricultural Land Reform Office (ALRO) to allocate land in a land reform area to

⁴³³ The use of privately-owned land might be under some land-use restrictions, as will be observed in section 2.2 below.

⁴³⁴ Some commentators add that vesting the power to manage the land on government can be seen as a form of regulation (see Ogus (n 99) 265).

The legal concept of public ownership for land owned by state bodies is one of the most challenging and complex areas of Thai property law. This study will not examine this point as it is not the main point for the examination. See the general discussion from a comparative law perspective regarding the controversy of the concept of public ownership in Giorgio Resta, 'Systems of Public Ownership' in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law Global Perspectives* (Edward Elgar 2017) ch 10.

⁴³⁵ See CCC, s 1304, and Land Code, ss 8 and 8 bis.

farmers for agricultural utilisation.⁴³⁶ This enables farmers to farm on that land without limit of time period as long as they use the land for agriculture, but they cannot sell it as the land reform area belongs to the state.⁴³⁷ Nevertheless, land rights entitled under this Act remain unclear in many respects. For example, there are the ambiguities concerning the legal status of the land right and the effects of or sanction for non-compliance. However, as an individual can be granted the right to occupy and farm on this type of land, it is worthy of attention because this type of land might be subject to the conservation by CAs, as will be discussed in section 2.4 of chapter 6.

Another category of publicly-owned land is public-domain land. Theoretically, it is the land held for common use or reserved for the common benefit. The land under this category can be divided into the land for the common use and that reserved for the common interest. The first denotes the land which people are entitled to utilise together, without preventing others from using it as common property,⁴³⁸ e.g. foreshores, waterways, highways, lakes. The latter is not allowed for the common use *per se* but reserved for the use by public bodies for the public interest.⁴³⁹ This type of land is different from the first group as no one is allowed to occupy it. However, state authorities that are in charge of managing reserved areas may allow communities or individuals to occasionally use the areas, for example for a recreational purpose.⁴⁴⁰ The restriction of uses might be provided to serve the collective benefit of society, e.g. national parks and wildlife sanctuary areas.⁴⁴¹

2.2 Land use regulation and nature conservation

As the aim of this thesis is to examine a legal option for conservation, it is worth examining whether the existing laws in Thailand provide any measures to control the use of land and to conserve natural features found therein. This section investigates the key legal techniques which can be employed to control activities on land as well as those implemented for the conservation of nature. Admittedly, these two areas are a combination of various pieces of

⁴³⁶ This type of land will be examined in-depth in the research as it accounts for around 11 percent of the country's land and the nature of the land right under this Act need to be observed.

⁴³⁷ Agricultural Land Reform Act BE 2518 (1975), s 36 *bis*.

⁴³⁸ Pramoj (n 404) 107-108.

⁴³⁹ *ibid*.

⁴⁴⁰ *ibid*.

⁴⁴¹ Soontariya Mueanpawong, 'The Utilisation and Protection of Public Domain' (Master Degree Thesis Thammasat University 1994) 33-34.

legislation. It is beyond the scope of this thesis to conduct a comprehensive study, and that is not the main objective of this thesis.

This section seeks to overview the established legal measures that can be implemented to control or manage activities conducted on land and those for the conservation of natural features. This examination intends to view these legal areas from a regulatory perspective by highlighting which activities are regulated in what ways. Then, this section will summarise the roles of governmental bodies in employing legal measures for land-use regulation and nature conservation.

The term ‘land-use regulation’ is used here for the legal tools aiming at controlling social behaviour regarding the use of land. The laws relating to the regulation of land use, therefore, encompass various legal measures implemented or available for the control of how the land is utilised. However, this section will pay attention to those relating to the use of privately-owned land as it is the core objective to be conserved by a new legal tool.

The law of nature conservation, on the other hand, has no well-accepted definition.⁴⁴² This thesis employs this term as the laws providing the legal measures for the conservation of natural features. Its common features can be highlighted as the laws providing measures to maintain, enhance or restore the quality of the natural environment, including the population of living features and the ecological functions of ecosystems.⁴⁴³

There are reasons for summarising the laws relating to land-use control and nature conservation together. First, several measures falling under the label of nature conservation law also are under the definition of the land-use control law.⁴⁴⁴ Second, the regulatory technique employed by these areas of law is the same or very similar. They employ a C&C regulatory technique and confer the powers to intervene in human activities on governmental bodies. They can be briefly described from a regulatory perspective as follows.

2.2.1 Land-use planning

The words ‘land-use planning’ reflect the use of plans, policies and strategies to manage the use of land. A prominent law dealing with this task is the Town Planning Act BE 2562 (2019),⁴⁴⁵ which was recently enacted and repealed the previous law

⁴⁴² Boonrueang (n 10) 27.

⁴⁴³ *ibid.*

⁴⁴⁴ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP 2005) 40.

⁴⁴⁵ The term ‘town planning’ under this legislation can apply in both town and countryside areas.

implemented in 1975. This new law comes with modernised legal options for planning. It introduced comprehensive rules regarding strategic plans at national, regional and provincial levels.⁴⁴⁶ Apart from that, this law employs two categories of land-use plans, comprising a general town plan and a specific town plan (town plans can be used for rural areas).⁴⁴⁷ These two land-use plans play a pivotal part in laying down the rules about the use of land by conforming to the strategic plans mentioned above. While the general town plans can be implemented through a general plan, policy, project or control measure for the use of land in particular local areas, the specific town plans go further. They involve the implementation of a particular plan and project to develop or preserve a specific local area, where the general ones are in place.⁴⁴⁸

As mentioned above, a general town plan and specific town plan involve the control of land use, for both privately-owned and publicly-owned land. These types of plan are prepared and implemented by specific governmental bodies subject to conditions under the law.⁴⁴⁹ Similar to land-use planning rules implemented elsewhere, the law prohibits any person to use the land contrary to the land-use plans.⁴⁵⁰ The violation is subject to criminal offences in the nature of C&C regulation laid down behind this type of legal measure.

It is important to note that some parcels of farmland in the country are not under the land-use planning regime. Some of those, for instance, those declared as a land reform area under the management of ALRO, are part of forestland.⁴⁵¹ This type of area is not part of urban or rural areas, and the law regulates a land reform area with different and separate legal rules.

2.2.2 Designating of reserved or restricted areas

One of the conventional approaches for the conservation of nature or the management of specific areas is to provide legal status to those areas coupled with the adoption of an appropriate level of protection.⁴⁵² Designation of reserved or restricted areas serves

⁴⁴⁶ Town Planning Act BE 2562 (2019), s 8 (1).

⁴⁴⁷ *ibid* s 8 (2).

⁴⁴⁸ Department of Public Works and Town & Country Planning, *Manual for Specific Plan Preparation* (ONAB Press 2009) 1-2 and 1-3.

⁴⁴⁹ Town Planning Act BE 2562 (2019), ss 19, 23, 39.

⁴⁵⁰ *ibid* ss 37, 51 and 105.

⁴⁵¹ See the summary of the land under the management of the Agricultural Land Reform Office in sub-section 2.1.4.2 above.

⁴⁵² Reid, *Nature Conservation Law* (n 35) paras 5.1.1-5.1.5.

this task by embracing the support of legal power. In Thailand, it commonly entails conferring power on certain governmental bodies to designate or notify reserved or restricted areas. National parks and environmental protection areas represent the reserved areas designated for the purposes of nature conservation. The designation of a national park, for instance, can be made for a vast area of publicly-owned land having ecological values to be preserved for the common benefit, public education and amenity.⁴⁵³ Environmental protection areas, on the other hand, can be notified for any pieces of land, regardless of ownership by public bodies or individuals. The land eligible to be protected must have unique ecosystems or natural values which are likely to be harmed by human activities. Also, such land must not have been designated as other reserved areas under other laws.⁴⁵⁴ The designation of a contaminated land area exemplifies another function of this regulatory technique in dealing with environmental problems caused by anthropogenic pollution. A competent governmental body under the Land Development Act BE 2551 (2008) is authorised to deal with contaminated agricultural land by notifying the land or area in question as a controlled area. From a regulatory point of view, the designation of those areas illustrates at least two noteworthy points. First, it comes along with prohibitions or restrictions backed by criminal offences or subject to civil liability rules as will be summarised in 2.2.4 and 2.2.5. Second, it reflects that a primary approach for the conservation of land is reliant on C&C regulation, and there is no measure entitling public bodies to use a voluntary tool to conserve land and the features thereon.⁴⁵⁵

2.2.3 Listing of natural features to be protected or regulated

Similar to the regulatory technique of the designation of reserved or restricted areas, the use of a listing approach has been employed in Thailand for many decades. The listing of regulated trees and wild animals are evidence of this. The first has been used to regulate the utilisation of some valuable wood from publicly-owned land (forestland) by requiring a licence and royalty for such taking. Arguably, this might be seen as a mere control of natural resources on an economic ground rather than for an environmentally-based reason.⁴⁵⁶

⁴⁵³ National Park Act 2562 BE (2019), ss 4 and 6.

⁴⁵⁴ Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), s 43.

⁴⁵⁵ Boonrueang (n 10) 37-39.

⁴⁵⁶ See the discussion regarding the reasons for the use of a listing approach to regulated valuable wood in Thailand in *ibid* 32-33.

The use of a listing technique for nature conservation is clearly illustrated through four categories of wild animal lists under the Wild Animal Preservation and Protection Act BE 2562 (2019). The competent governmental bodies under this Act are entitled to declare the lists of preserved wild animals, protected wild animals, controlled wild animals, and dangerous wild animals subject to the conditions provided under the Act.⁴⁵⁷ Again, the listing approach is employed with its own reasons, the same as the designation of reserved and restricted areas. The main objective of the listing of wildlife is generally for the imposing of prohibitions, licence or approval to ensure that the regulated features are well conserved or managed. They come together with criminal offences or civil liability for the breach of such prohibitions or restrictions as will be seen in 2.2.4 and 2.2.5.⁴⁵⁸

2.2.4 Imposing prohibitions or restrictions for activities causing harm to specified features

As observed by many commentators, the mainstay of C&C regulation involves setting standards for compliance coupled with sanctions for non-compliance.⁴⁵⁹ This legal technique is often used to regulate the use of land and nature conservation, similar to other areas of laws in Thailand. The designation of reserved areas and listing protected wild animals will never protect those features unless the law further imposes some prohibitions or restrictions for activities causing harm to them. The same or similar technique is also applied to other tasks in this legal area. A particular piece of legislation also imposes prohibitions on burning forests or causing any damage to waterways in national parks.⁴⁶⁰ Some others, for example, land-use control law require formal approval for certain instances of land excavation and landfilling to prevent negative consequences.⁴⁶¹ Mining law exemplifies the prohibitions for causing contamination on watercourses from a mining

⁴⁵⁷ This Act sets the rules regarding the characters of wild animals in those lists as summarised below;

- ☐ Preserved wild animals are those recognised as having endangered status;
- ☐ Protected wild animals are those found in their natural habitats when they are likely to be threatened, and the reduction of their population affects the well-being of ecosystems;
- ☐ Controlled wild animals are those listed under the Appendices of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or others required some controlling measures;
- ☐ Dangerous wild animals are those likely to cause harm or poison to humans, wildlife or ecosystems.

See Wild Animal Preservation and Protection Act 2562 BE (2019), s 4.

⁴⁵⁸ *ibid* ss 4, 12 and 17.

⁴⁵⁹ Baldwin, Cave, and Lodge (n 95) 106.

⁴⁶⁰ National Park Act 2562 BE (2019), ss 4 and 6.

⁴⁶¹ Land Excavation and Land Filling Act BE 2543 (2000).

This legal requirement is not part of land-use planning observed in sub-section 2.1.1.

operation.⁴⁶² These examples describe the prevalence of this regulatory technique permeating Thai environmental-related laws. They also demonstrate that some other regulatory techniques, including the use of a voluntary agreement, could be introduced to work alongside these legal measures to offer scope for the employment of multiple tool kits to deal with environmental problems on land. Although it is beyond the scope of this subsection as well as this study to argue that the adoption of this regulatory approach is better than imposing tighter direct regulatory measures for conserving nature, this thesis takes the view that the examination how CAs can work along with C&C regulation is worthwhile.

2.2.5 Setting civil liability rules

As characterised in chapter 2,⁴⁶³ civil liability can be regarded as a form of legal regulation. Civil liability rules are found in various areas of law, including environmental law. It is applied to environmental cases in two respects, namely environmental damage from the leakage or dispersal of pollutants, and the destruction, loss, or damage of natural resources from an unlawful act. This type of regulatory tool can be supported by the regulation of land use and nature conservation in many ways. In the case of land contamination from any kinds of pollutants, an owner or possessor of contaminated land is liable for any damage arising from such contamination to pay compensation for those affected by the leakage of pollution based on a strict liability rule.⁴⁶⁴ This liability rule is applicable to damage on private property as well as that on environmental loss. Apart from that, there is another liability rule exclusively applied for destruction, loss, or damage of natural resources. This liability rule can be applied where a liable person causes any unlawful acts and results in the destruction, loss, or damage of natural resources on publicly-owned land,⁴⁶⁵ for example, if a person enters into a reserved area and clears vegetation therein for farming. These types of liability rule share a common concept in bestowing on a specific governmental body the right to claim compensation from a liable person. The damages awarded for

⁴⁶² Mineral Act 2560 BE (2017), s 68.

⁴⁶³ See sub-section 2.2.4 as part of the ranges of tools and techniques for regulation of chapter 2.

⁴⁶⁴ Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), s 96.

See the explanation of how a strict liability rule plays a role in environmental regulation in Michael G Faure and Roy A Partain, *Environmental Law and Economics: Theory and Practice* (CUP 2019) 105.

⁴⁶⁵ Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), s 97.

See some legal problems arising from this liability rule in Surasak Boonrueang, 'Problems on Liability for Damage Against Natural Resources Under Article 97 of the Enhancement and Conservation of National Environmental Quality Act BE 2535' (Master Degree Thesis, Faculty of Law Thammasat University 2012) 97-136.

these cases can be used for the restoration of contaminated or damaged land or paid to the individuals who suffer or are injured from such cases.

2.2.6 Providing financial incentives

Financial incentives can be a subsidiary and alternative legal tool that can help regulate the behaviour of landholders to carry out eco-friendly practices on farmland. A handful of laws provide incentives as part of environmental regulation. Some legislation has offered endowments for helping improve the wellbeing of the farmers. For instance, the government can use the Farmer Aid Endowment Act BE 2557 (2014) to allocate financial assistance for farmers who have experienced problems regarding agricultural issues. The Act can help farmers in several ways, for instance, giving a loan for buying essential agricultural materials or helping to provide farmland for poor farmers.⁴⁶⁶ Apart from that, the Agricultural Economics Act BE 2522 (1979) is in place for offering financial assistance for farmers. However, some limitations remain problematic. The financial incentive for farmers is exclusively for those farming in areas designated as an economic area, and the primary aims of such assistance are to build the capacity of farmers in producing agricultural products.⁴⁶⁷ The use of incentives for stimulating agricultural production seems to be an outdated policy. The experience from the European Union demonstrates that this policy could lead to intensive farming and overproduction.⁴⁶⁸ This reflects that the legal schemes offering financial incentives for an agricultural sector under the existing laws have not been implemented for improving farming practices to achieve an eco-friendly goal.

It is important to note that, from the very nature of C&C regulatory measures, the law confers the powers to use most of the above measures on governmental bodies. It seems that there are a few cases where non-governmental bodies can come into play, for example, the limited role in filing a civil liability case on behalf of injured persons. Lack of space for non-governmental bodies to participate under the existing laws raises the question of whether a new regime of CA-enabling law provides an appropriate place for non-governmental bodies to undertake some regulatory tasks. This question will be discussed in sections 2.3 and 2.12 of chapter 6.

⁴⁶⁶ Farmer Aid Endowment Act BE 2557 (2014), s 7.

⁴⁶⁷ Agricultural Economics Act BE 2522 (1979), ss 3 and 15.

⁴⁶⁸ Reid, *Nature Conservation Law* (n 35) paras 8.4.2-8.4.3.

Conclusion

This chapter has highlighted some points worth noting for the development of a legal proposal of a CA-enabling law for Thailand. It explored key existing problems and gaps, motivations for reform, and legal principles, which are relevant or support the creation of CAs in the Thai context.

The first part investigated the factual status quo of land use and environmental issues arising thereon; this thesis sees an interrelation between land use and environmental problems. The majority of land plots being used for agriculture indicates two points justifying why this thesis topic should be investigated. First, the diversity and complexity of environmental problems posed by human activities on this type of land indicate the room to improve agricultural practices to serve the conservation of nature. Second, the very nature of this type of land as privately-owned land means that it is worth discussing further regarding the use of a low intrusive legal tool to deal with such land-related problems, rather than the use of a C&C approach.⁴⁶⁹ This part also provided examples of situations where CAs could be made to deal with those environmental problems.

In light of the factual considerations mentioned above, the second part turned to the examination of available legal rules and options in place. This part revealed the availability of several laws in Thailand recognising land status, land rights, and providing rules regarding land-use regulation and nature conservation. However, the examination in section 2.2. above revealed that there is no law entitling governmental bodies to enter into a CA with landowners. Another reflection drawn from this part is about the regulatory style of the existing laws. Most of, if not all of, them are reliant on C&C regulation where governmental bodies play a vital role in implementing this kind of regulatory measures. The finding in this section also indicated that there is no statute recognising the use of a voluntary approach to conserve natural or cultural heritage on privately-owned land. This section noted that a voluntary agreement could be introduced to work alongside the existing C&C legal measures, and the examination of how CAs could be established is worth considering.

⁴⁶⁹ See sections 1.2 and 1.3 of chapter 3, which summarise the justification for the use of a voluntary approach.

The examination of such two aspects indicates the possibility of developing CAs as a new legal tool to work alongside the established laws. In light of the findings drawn and the arguments presented in section 2.2 above, this section noted that the examinations of how CAs could be introduced to work alongside the existing C&C legal measures, and how CAs could be established are worth considering. This thesis will examine the point of whether and how the new legal tool should be formulated in chapter 6 after the comparative study of CA-enabling legal models is discussed in the following chapter.

Chapter 5 The comparison of the selected CA-enabling laws

Introduction

The overview of CAs in chapter 1 reflects some fundamental aspects of CAs as a private law instrument implemented to serve the public interest. This chapter, as a crucial element of this thesis, seeks to compare the legal features found in the selected conservation agreement-enabling laws (CA-enabling laws) implemented in Australia, the UK and USA.⁴⁷⁰ This comparison aims to uncover the common characteristics of the law across different jurisdictions and to identify key strengths and weaknesses of each legal model. The findings from this chapter will provide lessons for Thailand by drawing out the key legal features of CA-enabling legal provisions.

One of the points worth discussing at the outset is the legal matters of CA-enabling law that should be the object of this comparative study. The findings from the review of relevant literature found that different scholars set different structures to analyse the application of CAs, and there is no standard for this categorisation.⁴⁷¹ This thesis identifies the critical elements for this comparative study based on various grounds. The first is the categorisation in light of the definition of CAs given by the Law Commission, summarised in chapter 1, as well as the matters to be taken into account in creating VEAs, investigated in chapter 3.⁴⁷² The second comes from considering the aim of this study, which seeks to introduce CAs to work alongside C&C regulatory measures and the existing legal tools in place in Thailand, as examined in chapters 2, 3 and 4. The last one takes into account the common elements in place in the comparator jurisdictions. Based on these three considerations, this thesis argues that thirteen legal considerations should be investigated to understand the application, strengths and weaknesses of CAs in place in Australia, the UK and USA. They are listed as follows.⁴⁷³

- 1) Terms, sources and development;
- 2) The purposes for which a CA can be created;

⁴⁷⁰ See the justification for the selection of these jurisdictions in section 4.3 of chapter 1.

⁴⁷¹ See different structures on how CAs can be investigated in Reid and Nsoh (n 17) ch 5; Law Commission (n 45) ch 3-8; Lausche (n 33) para 250.

⁴⁷² See part 6 of chapter 1 and part 5 of chapter 3.

⁴⁷³ The justifications of why each legal element should be independently examined will be explained at the start of each part.

- 3) Eligible land;
- 4) Holders;
- 5) Burdened landholders;
- 6) Obligations;
- 7) Durations;
- 8) Enforcement;
- 9) Incentives;
- 10) Registration;
- 11) Variation and termination;
- 12) Public oversight;
- 13) Compatibility with existing relevant conservation tools and laws.

The following sections begin with an introductory part justifying why such a point should be examined, along with the identification of specific points to be investigated. Then, the legal features extracted from specific statutes of each jurisdiction will be examined in turn. Finally, the legal substance drawn from each jurisdiction will be compared and analysed in an analysis section. The findings from analysis sections will be discussed by considering the problems and existing laws in Thailand as well as those relevant to the development of the legal proposal for Thailand.

Part 1 will illustrate the applicable terms, sources of law and legal backgrounds of CAs selected to compare in this chapter. This part aims at uncovering the diversity of the applicable terms under various specific laws and explaining how they are developed. Although the findings from this part will not be drawn on further discussion in chapter 6, it is worth investigating at the beginning because an understanding of the sources of law and legal backgrounds of CAs helps to explain how the comparator jurisdictions have developed their CA-enabling laws.

Parts 2 to 13 deal with the legal matters commonly established in the laws of the comparing jurisdictions.

The purposes for which a CA can be created, which will be investigated in part 2 is one of the vital elements of this tool distinguishing CAs from other voluntary environmental agreements (VEAs). This part will investigate the range of purposes of CA implementation under each CA-enabling laws, and the relationship between this and the points about the relevant actors (eligible holders and burdened landholders), qualified land and possible obligations to be examined in the latter parts.

Part 3 will investigate what land is eligible to be conserved by CAs. It will examine whether and how the law requires any conditions for the areas subject to this type of agreement. For example, it will examine whether or not publicly-owned land and water areas can be under CAs.

Part 4 will investigate who is authorised by the law to make a conservation agreement⁴⁷⁴ and what roles they play. The selection of this point for the comparison stems from the regulatory character of CAs, which seek to serve the public interest. Such character indicates that the issue of ‘who are entitled to make and hold interests arising from this tool?’ could be linked to the question ‘to what extent the implementation of this tool will be transparent and accountable’.

Part 5 will examine who is bound in CA obligations. Although landowners are a prominent party obligated to fulfil CA obligations, some statutes may set additional rules by imposing specific burdens on other persons, including tenants. In some statutes, they expressly provide that CAs bind future landowners. These characteristics raise the questions of the advantages and disadvantages of such express provisions.

Part 6 entails the examination of whether and how the laws of the three jurisdictions set a framework of obligations for an individual CA. Obligations imposed by CAs are distinctive from other burdens, running with the land, in that they may be positive obligations, as well as negative ones. The CA obligations will indicate what the duties imposed on a burdened landholder are. Once entering into effect, such a burdened landholder is required to fulfil the tasks agreed in the agreement.

Part 7 will examine how long the obligations imposed on burdened landholders should last. This part is critical because the binding period and effect of a CA, which generally runs with the land in perpetuity, is a crucial character of this legal tool and distinguishes it from an agreement under pure contract law.

Then, where burdened landholders fail to fulfil the obligation, a holder might enforce them with some sanctions. Part 8 will deal with this consideration, and demonstrate whether and how the measures of enforcement for a CA are different from those stipulated in private law of contract.

⁴⁷⁴ This thesis employs the term ‘holder’ to refer to an actor playing this role.

Part 9 is about the consideration of incentives. It will primarily investigate whether and what type of incentives can be offered to induce a potential landowner to enter into a CA. This consideration is crucial because incentives could increase the number of uptakes, and a CA with no incentive might look unattractive from the perspective of prospective landowners.

Part 10 is about the registration of the agreement on a land title document, which most jurisdictions require as a precondition of making a CA enforceable against a successor in title to the land. It will examine how each jurisdiction develops a condition for recording a CA, and what the legal effect of the recordation is.

Part 11 considers the variation and termination of a CA. It will examine whether and how CA-enabling laws of each jurisdiction provide rules for the modification or termination of CAs. This issue should be examined because CAs can be created to last in perpetuity or for decades, and bind future landowners. This could raise the discussion whether CA parties should be free to modify or terminate this type of agreement.

Part 12 will examine and discuss the need for a CA to be overseen by public bodies or non-parties. It will investigate the oversight measures established under the laws of the comparing jurisdictions. This point should be examined because in many cases, this legal tool is supported by public money. Without public oversight, the implementation of this tool might be questioned about transparency and accountability.⁴⁷⁵

Part 13 aims at examining the compatibility between the implementation of a CA and other legal tools imposed on the land. It seeks to investigate whether each jurisdiction provides legal provisions making this legal tool conform to others. This point should be examined because it helps explain how a private law instrument works along with other regulatory instruments. It is also helpful in determining and explaining the legal form and functions of a CA working in each jurisdiction.

The result from the examination in these parts will be drawn on to establish the legal structure of a proposed legal framework to Thailand by considering the factual and legal backgrounds of the country as considered in the previous chapter.

⁴⁷⁵ Martin Lodge and Lindsay Stirton, 'Accountability in the Regulatory State' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 352.

1. Terms, sources and development

This part examines how CAs are named under specific statutes in the comparator jurisdictions; and how they have been developed or introduced in a particular statute. The examination offers an overview of their legal background before each key legal consideration will be examined in parts 2 to 13.

The relevant label should be investigated at the beginning because CAs are named with different terms among the comparator jurisdictions. They include conservation agreements, conservation covenants, management agreements, conservation burdens and conservation easements. Understanding this point is crucial as each applicable term reflects the background of development and legal form of CAs,⁴⁷⁶ as will be observed in the later parts. This research uses the words ‘conservation agreement’ as an umbrella term representing those when they are stated in a general context because it reflects the legal form consistent with the common phrasing employed in other chapters.

Understanding sources of CA-enabling laws and their development are also worthy of study for three reasons. First, it helps to scope a range of statutes and their specific names for CAs to be compared in this chapter. Second, the history in implementing CAs under specific laws reflects that there is room to learn experience from the laws in the comparator jurisdictions. Third, these points reveal whether CAs under a specific law were developed as an independent conservation instrument or as a subsidiary tool to other conventional C&C regulatory measures.⁴⁷⁷

1.1 Australia

Overall, CAs implemented in Australia have different names. They range from conservation agreement, biodiversity stewardship agreement, wildlife refuge agreement, biodiversity conservation agreement, biodiversity conservation covenant, and conservation covenant. These CAs can be found both in the Commonwealth legislation and state statutes.

⁴⁷⁶ Reid and Nsoh (n 17) 179.

⁴⁷⁷ This point is interlinked with the consideration of the compatibility of CAs with the established legal rules to be investigated in part 13.

The use of CAs in New South Wales (NSW) can be traced back to those created under the National Parks and Wildlife Act 1974. This Act conferred on a competent state body the power to create a conservation agreement and declare a wildlife refuge on privately-owned land.⁴⁷⁸ After that, several statutes enabled specified public bodies to make this type of agreement with various labels.⁴⁷⁹ They include biobanking agreements,⁴⁸⁰ property agreements,⁴⁸¹ and trust agreements.⁴⁸² In 2016, the coming into effect of the Biodiversity Conservation Act 2016 (BCA 2016 (NSW)) made some changes in the regime of implementing CAs in NSW. In brief, it repealed and revised the rules of making CAs under the NSW regime, and CAs under this Act replace CAs under the previous ones. CAs under the new legislation of NSW are divided into three categories, which offer different options for conservation. They comprise biodiversity stewardship agreements,⁴⁸³ conservation agreements and wildlife refuge agreements. The details on how different they are will be examined in the following parts.

Similar to NSW, Western Australia (WA) introduced several statutes enabling competent public bodies to make various forms of CA with landowners. They include conservation covenants, agreements to reserve, and heritage agreements.⁴⁸⁴ In 2016, a new generation of CAs under the WA regime came together with the promulgation of the Biodiversity Conservation Act 2016 (BCA 2016 (WA)). It offers two categories of CAs, namely a biodiversity conservation agreement and biodiversity conservation covenant.

Unlike NSW and WA, the Commonwealth government introduced CAs as a regulatory conservation tool in the 1990s under the label ‘conservation agreement’. Conservation agreements under the Commonwealth legislation are worth examining as an example of the CAs which can be implemented to conserve various natural features in various

⁴⁷⁸ National Parks and Wildlife Act 1974, ss 68, 69A-69KA.

⁴⁷⁹ Environmental Defenders Office, ‘Conservation on Privately-owned land-Fact Sheet’ <www.edonsw.org.au/conservation_on_private_land> accessed 14 May 2020.

⁴⁸⁰ Threatened Species Conservation Act 1995 (NSW), ss 127D-127U.

⁴⁸¹ Native Vegetation Conservation Act 1997 (NSW), ss 40-45.

⁴⁸² Nature Conservation Trust Act 2001 (NSW), ss 30-38B.

⁴⁸³ Biodiversity stewardship agreements represent CAs introduced to employ a market-based instrument for environmental protection, as mentioned in chapter 1. This special purpose of implementation means that they require special governing rules. For instance, they require a participating landowner to enable the creation of biodiversity credits and their release for sale, as well as to carry out any management action in perpetuity.

⁴⁸⁴ See Soil and Land Conservation Act 1945 (WA), ss 30A-30F; National Trust of Australia Act (WA) 1964 (WA), s 21A; Heritage of Western Australia Act 1990 (WA), ss 29-32.

types of areas.⁴⁸⁵ This character enables this conservation tool to serve the tasks of the federal government, which are distinctive from those of the state and territory governments, as will be explained in turn. The advent of CAs under the Commonwealth law could not take place without the legislative reform of federal environmental law in the 1990s. Thus, it is worthwhile summarising how CAs have been developed in the Commonwealth legislation.

Before 1992, the role of the Commonwealth government remained unclear due to the ambiguity whether and to what extent the federal constitution vests the power to legislate on subject matters about the environment in the federal government.⁴⁸⁶ In 1992 the representatives of federal, state and territory governments agreed to make a clarification of environment-related power under the Intergovernmental Agreement on the Environment.⁴⁸⁷ After that, the Commonwealth government introduced the Endangered Species Protection Act 1992. One of the legal tools introduced in this Commonwealth legislation was the use of a conservation agreement.⁴⁸⁸ This Act was repealed in 2000⁴⁸⁹ after the coming into effect of the Environmental Protection and Biodiversity Conservation Act 1999 (Commonwealth) (EPBCA 1999). The provisions regarding the use of a conservation agreement were subsequently reiterated in the new federal legislation.

1.2 UK

The applicable terms for CAs found in the UK are varied, including ‘management agreement,’ ‘conservation burden’ and ‘conservation covenant’. Management agreements are found in various statutes relating to nature conservation.⁴⁹⁰ Conservation burdens, on the other hand, can be created under the Title Conditions

⁴⁸⁵ In brief, CAs under the Commonwealth regime can be implemented in land and marine areas to conserve various features, as will be summarised in part 2.

⁴⁸⁶ See the discussion in James Crawford, ‘The Constitution and the Environment’ (1991) 13 Sydney Law Review 11, 12; Scotford (n 58) 102.

⁴⁸⁷ Godden, Peel and McDonald (n 17) 116-117.

⁴⁸⁸ Endangered Species Protection Act 1992 (Commonwealth), ss 3 (1)(2), 5 and 50-55.

⁴⁸⁹ Endangered Species Protection Act 1992 (Commonwealth) was wholly repealed by the Environmental Reform (Consequential Provisions) Act 1999 (Commonwealth).

⁴⁹⁰ Christopher P Rodgers, *Agricultural Law* (4th edn, Bloomsbury 2016) para 13.93.

(Scotland) Act 2003 (TC(S)A 2003).⁴⁹¹ Conservation covenants are not in place yet but are worth examining as they are contained in the Bill for England and Wales.⁴⁹²

Management agreements were developed as one of the legal instruments for conservation aims. Despite running for a limited and short period,⁴⁹³ they bind a successor in title to land. The term ‘management agreements’ used in this chapter is a mere common term representing many others found in certain statutes.⁴⁹⁴ Other comparable names include the terms ‘agreements for the management of nature reserves’,⁴⁹⁵ ‘land management agreement’⁴⁹⁶ and ‘SSSIs agreement’.⁴⁹⁷ Management agreements have played a prominent role in conserving the environment on farmland in the UK for many decades.⁴⁹⁸ They have a common background in that before they appeared in certain statutes, nature conservation on privately-owned land was a voluntary practice of landowners,⁴⁹⁹ and the advent of management agreements changed the role of landowners to form a partnership with the governments.⁵⁰⁰

The origin of management agreements in the UK can be traced back to the 1930s, starting from the use of statutory covenants under the National Trust Act 1937.⁵⁰¹

⁴⁹¹ This law does not provide the meaning of ‘title conditions’. However, this term is widely used in Scottish land law, referring to restrictions or requirements recorded in a title deed. Title conditions could prohibit or facilitate specific actions likely to be carried out on the property (see Scottish Executive, *A Guide to the Abolition of Feudal Tenure Act and the Title Conditions Act for Housing Associations* (Scottish Executive 2004) 1).

⁴⁹² See Environment Bill introduced to the House of Commons on 30 January 2020 (HC Bill 9) at <<https://services.parliament.uk/bills/2019-20/environment.html>> accessed 14 May 2020. This Chapter will use the ‘Environment Bill’ to refer to the Environment Bill 2019-2020, in which conservation covenant provisions are incorporated.

⁴⁹³ Management agreements which are in place in the UK usually work for a limited and fixed period, for example, those under Higher Level Stewardship Programme lasted for ten years (Colin T Reid, ‘The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK’ (2011) 23 *Journal of Environmental Law* 203, 211; Christopher P Rodgers, *The Law of Nature Conservation* (OUP 2013) 302).

⁴⁹⁴ The term ‘management agreement’ appears in Wildlife and Countryside Act 1981, s 39, and the Natural Environment and Rural Communities Act 2006, s 7.

⁴⁹⁵ National Parks and Access to the Countryside Act 1949, s 16.

⁴⁹⁶ Environment (Wales) Act 2016, s 16.

⁴⁹⁷ An SSSI agreement is a management agreement made under s 15 of Countryside Act 1968. The abbreviation ‘SSSI’ refers to ‘a site of special scientific interest’, an area designated due to its special features. It was first introduced in 1949 under NPACA 1949, and is now governed in England and Wales under WCA 1981 (Reid, *Nature Conservation Law* (n 35) paras 5.5.1-5.5.4).

⁴⁹⁸ Christopher P Rodgers, ‘Property Systems and Environmental Regulation’ in Lees and Viñuales (n 3) 712.

⁴⁹⁹ Rodgers dates the starting point of the change in land-use management regime from 1981, when the Wildlife and Countryside Act 1981 (WCA) came into effect. The change of governmental policies in each region of the UK is also observed from the revision of WCA 1981 (Rodgers, *Law of Nature Conservation* (n 493) 111).

⁵⁰⁰ *ibid* 302; Reid, *Nature Conservation Law* (n 35) para 1.6.30.

⁵⁰¹ See National Trust Act 1937, s 8. Something similar has also existed in the form of forestry dedication agreements; see now Forestry Act 1967, s 5.

These covenants have been implemented for decades before the initiation of management agreements. However, their ability is limited to the creation of negative burdens, which means that they are unable to require a landowner to plant trees on their land for wildlife habitats as it is a positive obligation.

In 1949, the advent of the National Parks and Access to the Countryside Act 1949 (NPACA 1949) made a significant change for the conservation of natural features by agreement.⁵⁰² This legislation confers on a competent body the power to create a management agreement with a landowner to establish a nature reserve.⁵⁰³ Since then, this approach has been used in other statutes.⁵⁰⁴ Management agreements under various laws in place in the UK can be created by specified conservation bodies to work alongside or as a supplementary tool of the mainstream regulatory tools of each statute.⁵⁰⁵ They also aim to require landowners or other persons to do or refrain from doing certain activities on land, and such a requirement binds a successor in title to the land. As observed by Rodgers, management agreements can be categorised into two broad categories. The first are those concluded under nature conservation legislation, and the latter are those offered and concluded under agri-environment schemes funded under the Common Agricultural Policy (CAP). In many cases, a landowner may have agreements under both at any one time.⁵⁰⁶ The relevant substantive content of management agreements under these statutes will be explained further in the next parts.

Conservation burdens are another legal tool operating under a different legal regime and are exclusively applied in Scotland. They can be created under TC(S)A 2003. Unlike management agreements which mostly operate as a part of nature conservation law, a conservation burden, as a type of real burden,⁵⁰⁷ is a legal instrument under land

⁵⁰² Ross and Rowan-Robinson (n 47) 87.

⁵⁰³ NPACA 1949, s 16(1).

⁵⁰⁴ See Countryside Act 1968 (CA 1968), Wildlife and Countryside Act 1981 (WCA 1981), Natural Environment and Rural Communities Act 2006 (NERCA 2006) and Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (CHSR 2017).

⁵⁰⁵ Ross and Rowan-Robinson (n 47) 89.

How management agreements can work as a supplementary tool within environmental governance in the UK will be examined in part 13 regarding the compatibility with an existing regime.

⁵⁰⁶ Rodgers, *Agricultural Law* (n 490) para 13.93.

⁵⁰⁷ Specifically speaking, conservation burdens are unlike other burdens in that they are personal real burdens. This type of burden is not created to be in favour of a benefited property, but rather of an individual legal person (see Kenneth G C Reid, *The Abolition of Feudal Tenure in Scotland* (Lexis Nexis Butterworths 2003) para 2.9).

and property law.⁵⁰⁸ TC(S)A 2003 is an outcome of the reform of land law, abolishing the remains of the feudal system.⁵⁰⁹ The idea in developing this legal tool was influenced by the first version of the Uniform Conservation Easement Act (UCEA) released in 1981.⁵¹⁰ This implies that this type of burden has a similar notion as that of conservation easements under the UCEA regime. This makes its legal approach in dealing with the creation, implementation and enforcement of a conservation burden slightly different from those under management agreement authorisation statutes.

The last type of CA in the UK is a conservation covenant. Though it has not been introduced yet, the Law Commission papers, proposing to introduce a conservation covenant-enabling law in England and Wales, is immensely important as an important work discussing and suggesting a legal skeleton of a conservation covenant enabling law.⁵¹¹ The points discussed in these reports will be heavily investigated in this study.

1.3 USA

CAs implemented in the USA are different from those of Australia and the UK in several aspects, and such dissimilarities constitute specific characteristics as will be examined in this chapter.

The first distinction is that they are commonly called ‘conservation easements’. The word ‘easement’ itself shows that it is developed from the concept of a traditional easement.⁵¹² One of the grounds of the creation of this legal tool in the USA is to diminish the common law impediments which do not allow the creation of perpetual

⁵⁰⁸ Real burdens as a legal vehicle under Scottish property law have been commonly used in Scotland since the Eighteenth century. Landowners, who sell their property, can impose obligations and restrictions on the use of land sold, for example requiring the purchaser to maintain the property. This type of obligation, which can run with the land, is called ‘real burden’ (Tom Guthrie, *Scottish Property Law* (2nd edn, Tottel Publishing 2005) 186).

⁵⁰⁹ Reid and Nsoh (n 17) 181-182; Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) paras 9.6–9.7 and 9.10-9.12.

⁵¹⁰ Reid, *Nature Conservation Law* (n 35) para 4.4; Scottish Law Commission, *Discussion Paper on Real Burdens* (Scot Law Com DP No 106, 1998) paras 2.56-2.59; Reid (n 507) para 4.4.

⁵¹¹ Two reports being examined in this chapter are Law Commission (n 45); Law Commission (n 84).

⁵¹² See National Conference of Commissioners on Uniform State Laws, ‘Prefatory Note’ (Uniform Conservation Easement Act Last Revised or Amended in 2007) 1.

It is noteworthy that, although developed from the legal concept of an easement, many scholars see conservation easements as an ‘agreement’ which creates a property right as many conservation easements are created by means of agreement (Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook* (2nd edn, Land Trust Alliance 2005) 7; Environmental Law Institute, *Legal Tools and Incentives for Private Land in Latin America: Building Models for Success* (Environmental Law Institute 2003) 21).

and negative easements in gross.⁵¹³ Although the term ‘conservation easement’ is frequently used, some states may use different terms but share the same notion with a conservation easement; for instance, a ‘conservation right’, ‘conservation servitude’,⁵¹⁴ ‘land use easement’ and ‘conservation restriction’.

The second distinction is about sources of CA-enabling laws. The US has its model law suggesting how each state could develop its CA-enabling law as well as the state statutes, both those adopting the model law and others creating their own version. The Uniform Conservation Easement Act (UCEA), a non-legally binding instrument, plays a tremendous role in shaping conservation easement-enabling statutes of the majority of states. To date, more than 28 states have adopted some version of their statutes based on the model provisions stipulated under UCEA,⁵¹⁵ and this has become the main source for an individual state in drafting its law.⁵¹⁶ However, the remaining states have developed their own rules for governing the creation of conservation easements (non-UCEA states). Although such dissimilarities among the states in the USA may look messy, they create an opportunity to consider possible options and models of a CA to be developed for other jurisdictions. Also, they assist discussion on the strengths and weaknesses of the legal model representing each jurisdiction.

Regarding the development of conservation easements in the USA, their emergence and popularity partly resulted from the difficulty in regulating the use of privately-owned land as that is too politically unpalatable.⁵¹⁷ Hence, the use of conservation easements, a low coercive approach, was employed in preference.⁵¹⁸ Conservation easements originated from conservation practices by individuals and public authorities before there were general legal instruments in state statutes. The term ‘conservation easement’ was initially coined by William Whyte in his works, namely ‘Securing Open

⁵¹³ Robert H Levin, *A Guided Tour of the Conservation Easement laws* (Land Trust Alliance 2010 (updated 2014)) 5; K King Burnett, ‘The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee’ (2013) *Utah Law Review* 773, 775.

⁵¹⁴ This term is used in Louisiana, the state where the legal system has been influenced by French law. Such a different legal background has influenced the term used, employing the term ‘servitude’ rather than ‘easement’ (A N Yiannopoulos, ‘Predial Servitudes; General Principles: Louisiana and Comparative Law’ (1968) 29 *Louisiana Law Review* 1, 12).

⁵¹⁵ Levin (n 513) 6.

⁵¹⁶ Cheever and McLaughlin (n 49) 117-118.

⁵¹⁷ Owley (n 29) 1098; Cantley (n 26) 216.

⁵¹⁸ Owley (n 29) 1098-1099.

Space of Urban America: Conservation Easements'⁵¹⁹ and 'The Last Landscape'.⁵²⁰ His books argued for an alternative approach for privately-owned land conservation.⁵²¹ Conservation practice akin to the use of conservation easements can also be traced back to the use of public money to purchase easements to protect the land by the National Park Service during the 1930s and 1940s in Virginia, North Carolina, Mississippi, Alabama, and Tennessee.⁵²² Then, many states started using conservation easements after the late 1950s.⁵²³ For example, California and New York introduced their conservation easement-enabling laws in 1959 and 1960, respectively. Also, forty states had enacted conservation easement-enabling statutes by 1979.⁵²⁴ The popularity of donating conservation easements over land also benefited from a tax incentive for the charitable gifts of conservation agreements introduced by the Internal Revenue Services in 1964.⁵²⁵ Then, this financial incentive gained legislative recognition under the Internal Revenue Code (IRC) s 170(h) in 1980.⁵²⁶ In 1981, after the Congress passed this law, the Uniform Law Commission held a national conference for drafting a model law.⁵²⁷ An outcome of this conference was the promulgation of UCEA, which has played a significant role in unifying the legal regime of land conservation by conservation easements mentioned above.

Another point to be noted with the US legal model is about the legal landscape. Unlike those of Australia and the UK, conservation easements-enabling laws in the USA are comparatively complex due to the interaction between several statutes at the federal and state levels. Conservation easements can be made under federal and state laws to conserve features on the same parcel of property. Conservation easements under the federal regime can be made by an authorised body to serve a specific aim under a particular statute. Those under state statutes can be made between an owner of a

⁵¹⁹ William H Whyte, *Securing Open Space of Urban America : Conservation Easements* (Urban Land Institute 1959).

⁵²⁰ William H Whyte, *The Last Landscape* (University of Pennsylvania Press 1968).

⁵²¹ *ibid* 2-14.

⁵²² Cheever and McLaughlin (n 49) 117-118.

⁵²³ Zachary A Bray, 'Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements' (2010) 34 *Harvard Environmental Law Review* 119, 127.

⁵²⁴ Cheever and McLaughlin (n 49) 116.

⁵²⁵ *ibid*.

⁵²⁶ *ibid* 117.

⁵²⁷ Model Laws drafted by the Uniform Law Commission are not legally binding. The model laws are used as guidance to suggest to states in the USA how they might draft their laws based on the concepts contained in such model laws (Legal Information Institute, 'What are Uniform Laws?' <www.law.cornell.edu/uniform> accessed 14 May 2020).

property and public authorities or qualified non-public bodies.⁵²⁸ This type of conservation easement will be the primary object of comparison in this chapter. Conservation easements made under the rules of federal and state laws are independent of each other. In the past, the court ruled that a conservation easement made under a specific federal law need not conform to any conservation easement law of the states.⁵²⁹ The reasons for this could be that, first, they were governed by different pieces of legislation. Second, a landowner may seek to make a conservation easement under a state-level statute, and simultaneously desire to ask for a tax benefit from the donation of this easement under the federal tax law.

The significant number and variety of conservation easements in place in the USA under various statutes could make this study unreasonably complicated, therefore, this thesis will primarily examine some interesting points drawn from the UCEA and state statutes to see a range of options for the design of CA provisions. A range of state statutes enabling the creation of conservation easement is listed in the appendix of this thesis.⁵³⁰

1.4 Concluding remarks

The examination in the above sections suggests several points about the applicable terms, sources of law, as well as the legal background of CAs, which will be examined in depth in the latter parts. The first finding is about the variety of applicable terms of CAs used in the comparator jurisdictions. It illustrates how the law of each jurisdiction sets a primary purpose of CA implementation.⁵³¹ A CA called a ‘biodiversity conservation agreement’ reflects that it is used for biodiversity conservation; while a CA which is called a ‘management agreement’ may indicate a broader purpose. Again, those ending with the word ‘agreement’ seem to be less formalised in legal form, since an agreement is commonly made under the concept of private law of contract. This might be in contrast to those called ‘easement,’ which reflects an arrangement which

⁵²⁸ See the legal consideration on who are entitled to hold conservation easements in part 4 below.

⁵²⁹ See *United States v Albrecht* 496 F2d 906, 5th Cir (1974), where the court held that a conservation easement created by the US Fish and Wildlife Service under the Migratory Bird Hunting and Conservation Stamp Act 1934 has no need to comply with the laws of the states because it is an easement created under the federal scheme.

⁵³⁰ The names of the state will be used to represent a full statute’s name in the following parts.

⁵³¹ See the legal implications of different names and different legal form of CAs in section 2.4.1 below.

is formalised and binding in the long-term. This explanation will be comprehensively discussed after the key features of each jurisdiction are examined in part 2.

The second finding shows that CAs in all jurisdictions are an outcome of statutory intervention. Those jurisdictions have a certain type of the statute authorising the creation of CAs since CAs are unable to exist under traditional regimes.⁵³² The crucial legal impediments are that, first, common law does not allow the creation of positive obligations running with the land.⁵³³ Second, the laws in some jurisdictions do not allow the creation of an easement or covenants unless there is another piece of land that is benefitting from the easement or covenant.⁵³⁴ Third, there is a need to limit the restrictions on land as an asset that can be freely used and transferred by the current owner.⁵³⁵ The laws enabling the creation of CAs can be nature conservation-related statutes or land and property-related statutes, and the names used in each law could reflect the different legal background of the fundamental legal context within which it is formulated. The last observation is about the sources of CA-enabling laws. As it is impossible to examine all CA-enabling laws of each jurisdiction, the comparative study in the following parts is limited by focusing on some legislation representing the noteworthy legal characteristics in each comparator jurisdiction.

2. The purposes for which a CA can be created

The purposes for which a CA can be created is one of the crucial elements making CAs different from other VEAs examined in chapter 3. While the scope of VEAs can be to serve various ends relevant to the environment broadly, CAs exclusively entail the conservation of some features on land.⁵³⁶ This makes identifying the purposes and scope of a CA essential.

This part examines the question of what aim a CA under each CA-enabling law seeks to achieve. The words ‘purpose’ and ‘aim’ are used interchangeably to provide the actions, scope of features or other elements for which CAs can be made. This part will emphasise the examination of the scope of CAs in three dimensions, comprising (1)

⁵³² Korngold (n 52) 594.

⁵³³ Levin (n 513) 5; Burnett (n 513) 775.

⁵³⁴ Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327 2011) para 3.4; Reid and Nsoh (n 17) 181-182.

⁵³⁵ Reid and Nsoh (n 17) 180.

⁵³⁶ Law Commission (n 45) para 3.1; Reid and Nsoh (n 17) 185.

the actions sought to be captured; (2) features to be conserved; (3) consideration about the public interest; as they are key components justifying how a CA is different from other voluntary tools.

Various reasons support the importance of the investigation and comparison at this point. First, providing a range of scopes or purposes of CAs under a CA-enabling law would prevent misuse of a CA because it frames the activities for which a CA can be used.⁵³⁷ Setting a clear purpose for the implementation of this tool will also help shape the structure and features of the draft of a CA-enabling law during the drafting process.⁵³⁸ Second, the determination of the aims of implementing CAs will help this thesis identify the scope of the application of CAs in three jurisdictions. This characterisation could help to guide which specific form and purpose are appropriate for the development in Thailand. Third, it helps this study conclude whether each CA-enabling law is created explicitly for biodiversity conservation or can be broadly used for conserving natural or human-made heritage on land.

2.1 Australia

Overall, the purposes of implementing CAs under the Commonwealth and state laws are defined clearly, and all of them are illustrative of CAs mainly used for the conservation of natural features.⁵³⁹

The Commonwealth legislation is noteworthy in that it sets a prescriptive list of the features to be conserved. Such a list encompasses the conservation of several features, which include the world heritage values of designated World Heritage properties; the ecological character of a declared Ramsar wetland; the environment in a Commonwealth marine area; and the environment on Commonwealth land.⁵⁴⁰ Biodiversity stewardship agreements in NSW illustrate CAs having a specific aim to establish a biodiversity stewardship site.⁵⁴¹ Biodiversity conservation agreements in WA represent CAs having a wide range of application, which encompasses the

⁵³⁷ The Law Commission maintains this point that setting a clear purpose could prevent the emergence of unnecessary obligations (Law Commission (n 84) para 4.31).

⁵³⁸ Green Balance, *The Potential of Conservation Covenants* (Report by Green Balance to the National Trust, Green Balance 2008) 18.

⁵³⁹ BCA (NSW) 2016, s 1.3(j) and EPBCA 1999, s 3(2)(g)(ii).

⁵⁴⁰ EPBCA 1999, s 304(1).

⁵⁴¹ BCA (NSW), s 5.5

mitigation of negative impacts or prevention of activities harming biodiversity components, as well as promoting biodiversity conservation.⁵⁴² A biodiversity conservation covenant, on the other hand, can also be used for supporting scientific or public education purposes relating to the conservation, protection or management of biodiversity and its components on land.⁵⁴³

Regarding the requirement of the public interest, Australian laws do not provide that CAs must have a common purpose of achieving public interest. However, this element is implicit as a matter of consideration, where qualified holders are considering whether the proposed CAs they seek to enter into serve a public benefit in conserving biodiversity.⁵⁴⁴

2.2 UK

Although developed from different backgrounds and implemented to serve various objectives, CA-enabling laws in the UK reflect some noteworthy features. First, some of them enable CAs for conserving or managing both natural heritage and cultural heritage (human-made features), as well as for a recreational purpose, subject to the details and requirements under individual statutes. Second, some of them provide the meaning of conservation worth discussing for legislative reform.

Management agreements are representative of CAs that are mainly be implemented to conserve natural features. While some can be used to conserve or manage natural features or to establish some reserved areas,⁵⁴⁵ other statutes entitle competent bodies to conclude this type of agreement to conserve or manage the land for recreational purposes.⁵⁴⁶ Management agreements also illustrate a type of CA employing the words ‘conservation’, ‘restoration’, ‘protection’ and ‘management’ as the actions to be fulfilled. However, the provisions authorising the creation of management

⁵⁴² BCA (WA), s 114(2).

⁵⁴³ *ibid* s 122(1).

⁵⁴⁴ EPBCA 1999, s 305(2); BCA 2016 (NSW), s 5.8; BCA 2016 (WA) s 114(3).

⁵⁴⁵ See CHSR 2017, reg 20, which entitles the competent bodies to enter into management agreements to manage, conserve, restore or protect a European site or the land adjacent to such a site. See also CA 1968, s 15, which entitles the competent bodies to enter into SSSI agreements to conserve some special interest by reason of its flora, fauna, or geological or physiographical features.

⁵⁴⁶ See NPACA 1949, ss 15 and 16(1), which allow the competent bodies to create management agreements to establish nature reserves for securing the land, to conserve flora, fauna or geological or physiographical features and to serve recreational purposes providing opportunities for the enjoyment of nature or open-air recreation.

agreements do not explicitly require the achievement of the public interest. Arguably, by conferring the power to create management agreements on specified public bodies it is implicit that these bodies are responsible for making management agreements exclusively for the circumstances allowed by authorising statutes, and this *per se* could satisfy the need to promote the public interest.

Conservation burdens and conservation covenants have some features worth discussing together. First, they provide concise provisions enabling the designated bodies to use these CAs to conserve both natural and cultural heritage. Second, the achievement of the public interest is enunciated as an element of their implementation. Nonetheless, the text employed to deal with their implementation purposes is slightly different.

The Scottish legislation articulates that conservation burdens can be made for the protection or preservation of special characteristics of natural features or architectural or historical characteristics on land.⁵⁴⁷ However, the legislation does not employ the word ‘conservation’ as a purpose of the implementation but rather uses the term ‘protection’ and ‘preservation’. This could engender the question of whether the conservation bodies are entitled to make a conservation burden to restore or enhance natural features on land to increase the rate of biodiversity or not.

Similarly, the Environment Bill proposes that conservation covenants can be implemented to conserve both natural and cultural features on land.⁵⁴⁸ However, the Environment Bill embraces the word ‘conservation’ as an overarching term to deal with those features. The term ‘conserving’ of something is also defined to include ‘protecting, restoring and enhancing’ such a thing.⁵⁴⁹ Secondly, the Environment Bill considers the achievement of public good as a central element of conservation covenants, but this element is set as a matter for consideration before a qualified holder makes a decision whether to hold a conservation burden.⁵⁵⁰

⁵⁴⁷ TC(S)A 2003, s 38(1).

Reid pointed out that the latter objective seems to be more frequently used in practice (Colin T Reid, ‘Conservation Easements in the United Kingdom’ in Laurie Ristino and Jessica E Jay (eds), *A Changing Landscape: The Conservation Easement Reader* (Environmental Law Institute 2016) 511; Law Commission (n 84) para 3.15).

⁵⁴⁸ Environment Bill, cl 102(3).

⁵⁴⁹ *ibid* cl 102(4).

⁵⁵⁰ TC(S)A 2003, ss 3 (6) and 38(1). See further discussion of the property law reform in Scotland, which sought to employ real burdens to serve public benefit in Kevin Gray and Susan Francis Gray, ‘The Future of Real Burdens in Scots Law’ (1999) 3 *Edinburgh Law Review* 229, 232.

2.3 USA

Conservation easements created under state statutes have some standard features regarding the purposes of implementation. First, the majority of them commonly provide explicit purposes for their implementation. Second, while many states set the purposes for which a CA can be created similar to those of UCEA, some states do not.

UCEA, as a model law for states, provides a wide range of possible purposes, for instance, to protect natural resources and to maintain or enhance air or water quality.⁵⁵¹ The range of possible purposes for the use of conservation easements under UCEA demonstrates that conservation easements can be used to conserve the environment whether in a natural state or as adapted by humans, for example, open space for people to enjoy.

Currently, many state statutes adopt the purposes set out in UCEA to set their possible range of purposes. As summarised by Levin, conservation purposes stated in different state laws vary.⁵⁵² Some states mention the purpose of protecting wildlife habitat and rare species.⁵⁵³ Some extend the conservation purposes to cover the preservation of palaeontological features (fossil animals and plants) found in real property.⁵⁵⁴ Some allow the purposes to include the improvement of silvicultural and horticultural use.⁵⁵⁵ Some embrace the preservation and protection of traditional and family cemeteries.⁵⁵⁶ Some further include assuring the availability of the property for educational use as one of their conservation objectives.⁵⁵⁷

Regarding the requirement of serving the public interest, Maine obliges conservation easement creators to illustrate in the form of a statement how the purposes of a particular conservation easement will be achieved, and what conservation values and general public interest are intended to be served.⁵⁵⁸ Iowa sets a similar requirement of

The merit of providing this legal requirement is that it creates the justification for having no benefited property requirement, which is commonly required by other types of real burdens and servitudes. See Scottish Law Commission (n 509) para 9.10.

⁵⁵¹ UCEA, s 1(1).

⁵⁵² Levin (n 513) 9-10.

⁵⁵³ For example, Delaware, s 6901(1); Florida, s 704.06(1); Colorado, s 38-30.5-102.

⁵⁵⁴ For example, Alabama, s 35-18-1(1); Nevada, s 111.410; South Dakota, s 1-19B-56(1).

⁵⁵⁵ For example, Alabama, s 35-18-1(1); Colorado, s 38-30.5-102; Nebraska, s 76-2,111(1); North Carolina, s 121-35(1).

⁵⁵⁶ Hawaii, s 198-1.

⁵⁵⁷ Mississippi, s 89-19-3; New Hampshire, s 477:45; South Carolina, s 27-8-20.

⁵⁵⁸ Maine, s 477-A.

expressing the extent and purpose of an individual conservation easement.⁵⁵⁹ Massachusetts and Nebraska recognise the need to take public interest into account when governmental bodies acquire, release or approve a conservation easement.⁵⁶⁰

2.4 Discussions drawn from the variety of purposes for CA implementation

The examination in the previous sections illustrates that every jurisdiction has legal provisions regarding the purpose of CA implementation. While some provide exhaustive details about actions to be fulfilled, features to be conserved and the requirement of the public interest, many do not. This conclusion can be further discussed in three aspects in light of the issues that should be developed further to secure natural features on land in Thailand, as seen below.

2.4.1 Diversity of actions sought to be captured

The above sections indicate that the comparator jurisdictions employ different styles in relation to the actions sought to be captured. The Commonwealth law of Australia relies on the words ‘protection and conservation’. The UK employs many words, including management, protection, preservation, enhancement and conservation. The USA uses a conservation easement to do many tasks, including to conserve, protect, preserve, maintain, retain and assure. Many CA-enabling laws separate the term ‘protection, enhancement and restoration’ from the word ‘conservation’ but some of them use the term ‘conservation’ instead. This begs the question of how the term ‘conservation’ is perceived, and whether its meaning covers other words used as the actions sought to be captured. As a handful of CA-enabling statutes provide the meaning of conservation in the context of CAs, the exploration of the meanings of ‘conservation’ by the reviewing of literature should be made to fulfil this consideration.

‘Conservation’ is one of the terms perceived and used by many writers and law-makers in different ways.⁵⁶¹ Some use it as a catch-all term to describe many actions. As articulated by the World Commission on Environment and Development in 1986, and in the World Conservation Strategy drafted by the International Union for

⁵⁵⁹ Iowa, s 457A 4.

⁵⁶⁰ Massachusetts, s 32; Nebraska, ss 76-2,112 (3) and 76-2,114.

⁵⁶¹ Clive Hambler and Susan M Canney, *Conservation* (2nd edn, CUP 2013) 1.

Conservation of Nature (IUCN) in 1987, conservation is an umbrella term covering the actions of preservation, maintenance, sustainable utilisation, restoration and enhancement of the natural resources or the environment.⁵⁶² Often, conservation is used alongside the word ‘nature’ or equivalent terms.⁵⁶³ Domestic laws of some jurisdictions defined the features of conservation under the range of actions articulated in the World Conservation Strategy.⁵⁶⁴ The merit of using the word ‘conservation’ of certain natural values may vary and is not limited to keeping them without disturbance (preservation). It may also involve the use of resources and maintenance or enhancement of their quality.⁵⁶⁵ Sometimes, the word conservation may include the protection of some values or characteristics with the aim to use them sustainably and efficiently in the future.⁵⁶⁶ In addition, the interpretation of the term conservation in some jurisdictions may go further and include the activities of enabling a natural process of some natural features to be continued.⁵⁶⁷ Another merit of the use of this term originates from its flexibility. The Law Commission maintains that the term conservation is a dynamic concept and depends on scientific discovery.⁵⁶⁸ The court in England affirms this characteristic that conservation could include the preservation of a dynamic process of soil erosion by the natural actions of the sea.⁵⁶⁹ The grounds for this explanation is that although such erosion causes negative impacts in the loss of natural features on a designated reserved area (SSSI), it might help human beings understand the changes in nature in the coming future.⁵⁷⁰

This sub-section has no intention to argue that the term conservation is the most appropriate to use as a representative of actions to be fulfilled by CAs. Instead, it seeks to highlight the fragmentation and variation of the word conservation used in each jurisdiction and to review from the literature how far the term conservation can be interpreted or used. Hence, a country developing a CA framework should consider the

⁵⁶² IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (IUCN 1986) pt 1, para 4.

⁵⁶³ Hambler and Canney (n 561) 2.

⁵⁶⁴ For example, Nature Conservation Act 1992, s 9 of Queensland, Australia, provides that ‘*conservation is the protection and maintenance of nature while allowing for its ecologically sustainable use*’. BCA 2016 (WA), s 3 uses the definition that ‘*conserve includes to maintain and to restore*’.

⁵⁶⁵ IUCN (n 562).

⁵⁶⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2013) 593.

⁵⁶⁷ See *Boggis v Natural England and Waveney District Council* [2008] EWHC 2954 (Admin); [2009] EWCA Civ 1061 explained below.

⁵⁶⁸ Law Commission (n 84) para 4.33.

⁵⁶⁹ *Boggis v Natural England and Waveney District Council* (n 567).

⁵⁷⁰ Rodgers, *Law of Nature Conservation* (n 493) 17.

extent and scope of actions sought to be captured, whether it will use this word or other appropriate terms.

2.4.2 Diversity of matters or values to be conserved

The examination in previous sections illustrates the use of CAs to conserve different matters or values. While Australia tends to use CAs to conserve natural features,⁵⁷¹ the UK and the USA employ this tool to conserve both natural and cultural heritage. This sub-section discusses what can be the advantages and disadvantages to use CAs to conserve both natural and cultural heritage?

Some might maintain that CAs should be used only to conserve natural features because a narrow scope of purpose would make reasons for their use clear. Expanding the scope of CA implementation would require many bodies to manage this type of agreement because a nature conservation body may not have the capacity to protect historical or cultural features. In addition, extending the use of CAs to conserve cultural heritage might be impossible if the law authorising the creation of such CAs has limited scope for the protection of natural features. For instance, it is impossible to enter a conservation agreement to preserve an old building in a particular land under Environment Protection and Biodiversity Conservation Act 1999 (EPBCA 1999) of Australia because the main objectives of this law are to protect and conserve natural features,⁵⁷² and no provision of this legislation allows its use to preserve a historical or cultural site.⁵⁷³

Nonetheless, others may argue, against the above view, that some cultural heritage should be conserved, and it is appropriate to conserve by CAs.⁵⁷⁴ It is possible that old buildings, created for a hundred years, are located in an area having no vegetation. The point might be that if buildings are not be conserved due to their human-made characteristic, the chance of retaining some valuable features for the next generations will not be supported.

⁵⁷¹ Some Australian lawyers highlighted that the loss of biodiversity is one of the most severe environmental problems in Australia (David Farrier, Robert J Whelan and Carla Mooney, 'Threatened Species Listing as a Trigger for Conservation Action' (2007) 10 *Environmental Science and Policy* 219). Arguably, this could partly justify why the legal measures for conservation of biodiversity have been prevalent both in the Commonwealth and state levels.

⁵⁷² EPBCA 1999, s 3.

⁵⁷³ The point to be noted here is that CAs cannot be made under EPBCA 1999 to conserve cultural heritage.

⁵⁷⁴ Fisher (n 64) 15.

Regarding the point whether a CA should be used to conserve human-made features, setting a broad purpose of application would encourage eligible people to conserve heritage on their land. This would also increase a chance of using CAs for various objects or values, and this could help promote the increase in co-regulation, where an individual or private entity takes part in the role of conservation under the law.⁵⁷⁵ Apart from that, some features may have a mixed character, for instance, traditional farming practices which maintain folk wisdom (which could generate lower environmental impacts *per se*). If a CA can be made only for conserving natural features, this practice would be beyond of the scope of the conservation by CAs.

2.4.3 Public interest requirement

The use of CAs to serve the public interest engenders several questions, and it is beyond the capacity of this thesis to consider all dimensions of public interest in relation to land-use regulation.⁵⁷⁶ This thesis mainly examines ‘should CA-enabling laws provide the requirement of public interest as part of their provisions?’ The investigation of this consideration would help clarify how far the laws of each jurisdiction emphasise any requirement for CAs to serve the public interest, which has been discussed in section 1.2 of chapter 2.

Some might support that the public interest should be explicitly addressed as part of a provision in CA-enabling laws. The Law Commission argued for the articulation of this requirement in a CA-enabling law to prevent the inappropriate proliferation of CAs. At the same time, this could help balance the public interest against the private and voluntary nature of CAs.⁵⁷⁷ The existence of this requirement under the laws means that qualified holders are obligated to consider whether a CA they seek to make will generate or serve any benefit for society at large or not. This conforms to the view of those who support the application of the public interest theories, examined in chapter 2, that call on legislators to take account of whether a proposed regulatory tool would achieve a particular public interest or not.⁵⁷⁸ To serve this notion, setting a provision requiring the achievement of the public interest is necessary.

⁵⁷⁵ Paul Verbruggen, ‘Does Co-Regulation Strengthen EU Legitimacy?’ (2009) 15(4) European Law Journal 425.

⁵⁷⁶ This thesis regards the multi-dimensions of public interests as a research limitation and an issue for further study. See parts 2 and 3 of chapter 7.

⁵⁷⁷ Law Commission (n 45) paras 3.2 and 3.4.

⁵⁷⁸ Mitnick (n 103) 91.

Nonetheless, some others might oppose providing the requirement of public interest due to the difficulty in considering whether there is an overall benefit to the public interest.⁵⁷⁹ Hence, it would make the creation of an individual CA difficult and reliant on the interpretation of the achievement of public interest. Additionally, management agreements in the UK exemplify CAs which satisfy the need to achieve a public interest indirectly through the designation of public bodies as the only potential holders instead of providing an explicit legal requirement of this matter.⁵⁸⁰

The difficulty in determining whether and how a particular CA can serve an overall benefit to the public interest, mentioned above, raises another discussion regarding the domination of the public interest over an individual interest. Reid observes that it is acceptable if a CA is created for achieving some public benefits, even though such a CA generates a private by-product.⁵⁸¹ For instance, a farmer might be required by a CA not to use pesticides in a land plot adjacent to a river to avoid water contamination. Arguably, this could serve both the benefit to an individual who seeks to use water for a commercial purpose and the public as a whole where water in the river is free from pesticide. His view reflects the meaning of the word ‘interest’ through the lens on who obtains a particular benefit from CA implementation. K G C Reid explains this point by emphasising that a public benefit test can be achieved where it meets two conditions.⁵⁸² First, a CA (conservation burden) must generate certain direct benefits from the preservation or protection activities emerging from such a conservation burden. Second, such the direct benefits must fall, wholly or mainly, to the public rather than to individuals.⁵⁸³

The Law Commission argues that the words ‘public interest’ are not considering who would receive a specific benefit from the implementation of a CA, but rather a holistic concept. A CA can achieve a public benefit where such a CA can serve the general public wellbeing,⁵⁸⁴ and this value can be met regardless of whether ‘the public is able

⁵⁷⁹ This stems from the difficulty in determining what the public interest in a particular context is (Carl J Friedrich (ed), *The Public Interest* (Atherton Press 1962) ch 17).

⁵⁸⁰ It is presumed that governmental bodies will operate so as to fulfil their duty to act for the benefit for the public.

⁵⁸¹ Reid and Nsoh (n 17) 186; Law Commission (n 45) para 3.20

⁵⁸² Reid (n 507) para 4.6.

⁵⁸³ *ibid.*

⁵⁸⁴ Some literature maintains that broadly speaking, the implementation of a regulatory tool might be achieving a public interest goal by taking community value into account. In this sense, the words ‘public interest’ might loosely be described as ‘community values’ (see Ogus (n 99) 54).

to visit, to observe, or to touch what is being conserved'. In this sense, the terms 'public interest', 'public benefit' and 'public good' can be used interchangeably.⁵⁸⁵

3. Eligible land

The next issue is whether CAs should be available for all land, or qualifying land should be limited in some way. This is connected with the issues of who can enter a CA⁵⁸⁶ and the types of obligations involved, as will be examined in the latter parts.⁵⁸⁷ Admittedly, the term 'eligible land' can be viewed in various dimensions, and it is focused here in three aspects. The first considers whether the land is publicly-owned or privately-owned. The second examines the physical characteristics whether the land is covered in forest or forms wetland or water bodies. The third considers whether the land is used for agriculture or any other specific purpose. These three considerations should be investigated as they help uncover some findings which are relevant in view of the legal characteristics of land use in the Thai context, examined in chapter 4. The findings will be employed to further develop a legal proposal for Thailand in chapter 6. This part mainly examines whether any of the comparator jurisdictions use any such categories to limit the land that is eligible for inclusion within a CA.

3.1 Australia

Overall, CAs in Australia can be made on both publicly- and privately-owned land, but the Commonwealth legislation also enables an eligible holder to create a conservation agreement on marine areas.⁵⁸⁸

The administration of land owned and managed by the states or the Commonwealth government in Australia is vested on the notion of Crown land.⁵⁸⁹ In brief, the land which is unalienated to specific bodies or individuals is considered as Crown land.⁵⁹⁰ This type of land is eligible for the creation of CAs under the conditions specified by

⁵⁸⁵ Law Commission (n 45) paras 3.22-3.23.

⁵⁸⁶ See part 4 below.

⁵⁸⁷ See parts 4 and 6 below.

⁵⁸⁸ EPBCA 1999, s 304(2).

⁵⁸⁹ Department of Planning, Lands and Heritage, Government of Western Australia, 'Crown Land' <www.dplh.wa.gov.au/information-and-services/crown-land>; NSW Land Registry Service, 'Crown Land' <www.nswlrs.com.au/land_titles/land_ownership/crown_land>; Douglas E Fisher, *Natural Resources Law in Australia* (The Law Book Company Limited 1987) 62-3.

⁵⁹⁰ Fisher (n 589) 62.

specific statutes. For instance, BCA 2016 of NSW maintains that CAs can be entered into by the public authorities who own, control or manage Crown land.⁵⁹¹ One of the reasons supporting the protection of publicly-owned land by the use of CAs is that because this type of land accounts for nearly one-quarter of the country's area.⁵⁹² In NSW, for instance, over fifty percent of the land is Crown land.⁵⁹³ Therefore, it is not surprising that the Commonwealth government has concluded several CAs with state governments and regional councils, as explained in part 5.⁵⁹⁴

It is to be noted that both the Commonwealth and state legislation commonly provide that the land to be created as CA land must not be a parcel notified or established as nature reserves. For instance, the proposed land for the establishment must not be reserved sites under of the National Parks and Wildlife Act 1974 or a flora reserve or special management zone⁵⁹⁵ under the legal regime of NSW, and must not cover all or part of the Commonwealth reserve under the Commonwealth regime.⁵⁹⁶ The possible explanation for this could be that because such designated land is under the protection of specific laws. The interaction between the application of CAs and the designations of land will be examined further in part 13 below.

3.2 UK

Unlike Australia, the CA-enabling laws in the UK do not clearly provide whether or not water bodies can be conserved by CAs. Specific legislation provides specific rules regarding eligible land subject to the purposes of the implementation of each type of CA.

The legal regime for management agreements is noteworthy in that most of them are primarily created to conserve natural features on reserved areas or the land adjacent to such areas. Hence, several statutes provide that the eligible land must be a piece of land 'notified as nature reserves' or abutting such areas. For instance, the Conservation

⁵⁹¹ BCA 2016 (NSW), ss 5.9 (2), 5.21 (2) and 5.28 (2).

⁵⁹² Australian Bureau of Statistics, 'Year Book Australia 2002' <www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/C4F37E4488D32591CA256B35007ACE07?opendocument> accessed 14 May 2020.

⁵⁹³ NSW Land Registry Service (n 122).

⁵⁹⁴ Nevertheless, EPBC does not allow the Commonwealth government to enter into a CA in a publicly-owned land if such land is notified as a Commonwealth reserve (EPBCA 1999, s 305(4)).

⁵⁹⁵ Biodiversity Conservation Regulation 2017 (NSW), cl 5.1.

⁵⁹⁶ EPBCA 1999, s 305(4).

of Habitats and Species Regulations 2017 (CHSR 2017) require that the land must form a part of a European site, or be adjacent to such a site.⁵⁹⁷ Similarly, CA 1968 requires that the eligible land must be or form part of an SSSI.⁵⁹⁸ However, management agreements under Wildlife and Countryside Act 1981 (WCA 1981) might be an exception to this position. They may be created on land which is not within or adjacent to a reserved area.⁵⁹⁹ For instance, they can be made for the protection of water supply on which the conservation site is dependent.⁶⁰⁰

It should be noted that some statutes or funding programmes may provide additional conditions regarding eligible land. Management agreements administered by Scottish Natural Heritage under some specific schemes, for instance, require that eligible land must not be supported for conservation by other public funding programmes.⁶⁰¹

In contrast to management agreement authorising statutes, the laws authorising the creation of conservation burdens and conservation covenants does not require any specific characters of an eligible parcel of land. TC(S)A 2003 articulates that any land can be protected or conserved by this type of burden.⁶⁰² Meanwhile, the Environment Bill provides that both freehold and a leasehold estate of more than seven years are eligible land for the creation of conservation covenants.⁶⁰³

3.3 USA

Overall, most of the conservation easement-enabling statutes in the USA provide no specific requirements about the characteristics or legal status of land or areas to be conserved by a conservation easement. Specific conditions of eligible areas are provided as part of the statutes authorising funding for a conservation easement under specific governmental programmes, for instance, under the Farm Bills 2014 and 2018, which are out of the scope of this study. This means that as a general rule the question of eligible areas is not a significant consideration of creating a conservation easement. However, qualification of land to be conserved might be considered from the types of

⁵⁹⁷ CHSR 2017, reg 20(1).

⁵⁹⁸ CA 1968, s 15(1). See the explanation about SSSIs at section 1.2 above.

⁵⁹⁹ WCA 1981, s 39.

⁶⁰⁰ Justine Thornton and Silas Beckwith, *Environmental Law* (2nd edn, Sweet & Maxwell 2004) 261.

⁶⁰¹ Scottish Natural Heritage, 'Management Agreements' <www.nature.scot/professional-advice/funding/management-agreements?fbclid=IwAR1tRBOIBlxuUeqmIltW-Ns8UQuTSaESzTLAyEBPeMrzl6HTnfXTgx45m7w> accessed 14 May 2020.

⁶⁰² TC(S)A 2003, s 38(1)(b).

⁶⁰³ Environment Bill, cl 102(4).

conservation purposes. For example, the land eligible to create an open space should be land that the public can access and use. A conservation easement created for the protection of wetlands should be land that is a wetland itself.⁶⁰⁴

3.4 An analysis

As observed from earlier sections, the types of land can be viewed with different criteria, ranging from its ownership status, physical features and purposes of the use, and the comparing jurisdictions provide different provisions about those characteristics. Eligible land under the Commonwealth legislation of Australia can be terrestrial or maritime areas, and the former can be in either public or private hands. Some of the management agreements in the UK are limited to designated nature reserves, whereas conservation easement-enabling statutes in the USA do not require any specific features. It is worthwhile to discuss the benefits and drawbacks of such variety of legal features in the following considerations.

3.4.1 Private and public ownership

The laws in some jurisdictions clearly provide that the eligible land can be in the hands of public authorities or individuals, but many others do not provide any rules regarding this legal matter. Such an ambiguity raises the question whether or not land owned by public bodies should be included in the qualified land.

On the one hand, every piece of land should be conserved by CAs regardless of who owns them. Conserving the habitats of bees, a creature that helps in the pollination of flowers, could help maintain an ecosystem service of pollination regardless of where their honeycombs exist.⁶⁰⁵ Apart from that, not all publicly-owned land is notified as a nature reserve, and human activities may similarly threaten this non-nature reserve in the same vein as on the privately-owned property. For these reasons, publicly-owned land should be eligible for protection by this voluntary tool in a similar vein as privately-owned land.

⁶⁰⁴ Though silent in the conservation easement-enabling laws of most states, various specific qualifications of land are required under the law which funds a conservation easement concluded for specific aims (see Food Security Act 1986, s 1265C, amended by the Agriculture Improvement Act of 2018 (Farm Bill 2018)).

⁶⁰⁵ This idea lies behind payments for ecosystem services as observed by Reid and Nsoh: 'Payment for ecosystem services (PES) is based on the recognition that land left in an undeveloped state is not actually unproductive, as it is often perceived, but is providing a range of services of great practical, economic and spiritual value to society' (Reid and Nsoh (n 17) 77).

On the other hand, some might argue that the management of publicly-owned land is different from the land under the ownership of individuals. Some types of land, owned by public bodies, are restricted by the law authorising the management of such land. It means that some of them may be ineligible because of the legal restrictions by other laws managing the land. As will be seen in part 13 below, it is necessary to consider the compatibility of a CA-enabling law and other existing laws. Setting a strong argument that all land parcels are eligible might be unwelcome.

3.4.2 Physical aspect of eligible land

The Commonwealth law of Australia, recognising the use of CAs to conserve marine areas, illustrates an exceptional case in implementing CAs to conserve areas other than land. This raises the question of what are the advantages and disadvantages of implementing a CA to protect features in water areas and marine areas. Although land, water and marine areas are parts of Earth's surface, and several domestic laws recognise the rights to use and impose the duty to conserve them, the legal regimes governing these areas are different.⁶⁰⁶ Most jurisdictions consider that either individuals or public bodies can own land and real property thereon. This is not the case for water areas where the identification of who owns them is more complex and challenging to regulate,⁶⁰⁷ including recognition of different rights over rivers and lakes and their beds, and uses (e.g. fishing). Apart from that, where the areas in consideration are marine, various factors create complexities in regulating such areas.⁶⁰⁸ The complexity might be exacerbated by the fact that some watercourses run through several States.⁶⁰⁹ It means that where a CA-enabling law seeks to conserve water areas and marine areas, some specific provisions that reflect the rights of people who are involved should be made. This reflects that the challenging issues in implementing a CA to cover places other than the land might increase the complexity of the legal regime in administering a CA. The Commonwealth law of Australia deals

⁶⁰⁶ Reid, *Nature Conservation Law* (n 35) para 1.7.2; Rodgers, *Law of Nature Conservation* (n 493) 241.

⁶⁰⁷ See Craig Anthony Arnold, 'Sustainable Webs of Interests: Property in an Interconnected Environment' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff 2011) 171–72, 179.

⁶⁰⁸ See other difficulties in regulating marine biodiversity in Colin T Reid, 'Protection of Sites' in Lees and Viñuales (n 3) 848–49; Lynda M Warren, 'Law and Policy for Marine Protected Areas' in Christopher P Rodgers (ed), *Nature Conservation and Countryside Law* (University of Wales Press 1996) 69–7.

⁶⁰⁹ See the definition of 'international watercourse' in Article 2 (b) of the Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700).

with this challenge by setting the broad purposes of implementation, as observed in section 2.1 above.

Nevertheless, this might be problematic in other jurisdictions where the proposed aims of CA implementation are limited to the conservation of features on land, and the main target participant is a landowner. Hence, setting the scope of CA implementation to the conservation of features on land by a landowner could help to avoid complexity in the governing regime, and the extension of the scope of an eligible area to water areas might be out of the capacity of a private law instrument. However, such an extension might look attractive in broadening the scope of CA implementation if there are identifiable holders of relevant rights to be limited.

3.4.3 Land categorised by the purpose of the use

As observed above, the UK statutes, which allow the creation of management agreements for nature reserves, exemplify the CA-enabling laws setting a legal requirement regarding the types of land use. This example engenders a discussion about the advantages and disadvantages of providing the requirement of land-use patterns. As observed in the previous chapter, one of the considerations to be taken into account when governments seek to introduce a voluntary environmental agreement is the amount of uptake (numbers of participants).⁶¹⁰ If the eligible land is narrowly defined, for example, the land must be native woodland with an area at least 100 acres, the pieces of land qualifying under this condition are likely to be limited, and for these it remains uncertain how many of the landowners will be interested in entering into this CA scheme. However, providing a specific qualification of land might look attractive in some situations. First, it might be appropriate where a law-maker seeks to introduce a CA as a supplementary tool of C&C regulation. Management agreements seeking to establish a nature reserve in the UK are illustrative of CAs introduced to serve as a supplementary tool of the designation of natural areas under nature conservation law regime in the UK. Second, it might be desirable where a prospective holder can predict that the amount of uptake will be high and requiring a specific qualification of land would make the uptake manageable.

⁶¹⁰ Macrory (n 134) 634. See sub-section 5.3.1 of chapter 3.

4. Holders

The considerations regarding the actors involved in CA implementation can be examined in various aspects.⁶¹¹ This part entails an examination of who can be designated by the law as CA holders. The term ‘holder’ is used as meaning the party to whom the landowners (or other burdened landholders) owe obligations. A CA-enabling law generally designates a holder (a qualified holder) for two reasons; (1) to enter into a CA with a landowner,⁶¹² and (2) to hold the benefits or enforce an obligation arising from such a CA.

The overarching question will be split into three sub-questions. The first is whether each jurisdiction has provisions concerning who can be responsible for concluding a CA with a landholder. The second entails the investigation of whether non-governmental organisations or institutions are eligible to play this function. The last one considers whether the laws of the comparator jurisdictions provide any rules regarded as a back-up holder, where a new body becomes a CA holder where the situations stipulated in a CA-enabling law arise.

The examination in this matter is essential to the understanding of CAs from the aspect of environmental regulation. This examination will uncover whether the law views a CA as a mere conservation tool of government or as a means of encouraging public participation where non-governmental bodies can come into play.⁶¹³ The investigation in this part is also linked to matters discussed in later parts, e.g. considerations about overseeing compliance as well as the registration of CAs, as will be examined in parts 10 and 12.⁶¹⁴

4.1 Australia

Overall, CA laws in Australia designate specific public bodies to be the qualified holder. At a national level, EPBCA 1999 vests the power on the Minister for the Environment (the Minister).⁶¹⁵ This is slightly different from the regime in NSW

⁶¹¹ Another consideration to be investigated is that about burdened landholders in part 5 below.

⁶¹² The word ‘landowner’ in this part includes an owner or possessor of a piece of land who is proposing to sign a CA or persons who are eligible to fulfil a CA’s obligation. The detail of this term will be discussed in part 5 below.

⁶¹³ The wider issue of public oversight and participation is discussed in section 12.4 below.

⁶¹⁴ In Law Commission (n 45) the point about public oversight was examined as part of the consideration of responsible bodies. However, this thesis does not follow that approach, and seeks to study the point about public oversight and monitoring compliance separately.

⁶¹⁵ EPBCA 1999, s 302(1).

where the power is vested in two public bodies according to the type of CA.⁶¹⁶ The Minister for the Environment (the Minister of NSW) and the Biodiversity Conservation Trust (BCT) are entitled to decide whether a certain type of privately-owned land conservation agreement will be made between NSW Government and eligible landowners or not.⁶¹⁷ Similarly, WA sets certain public bodies who are entitled to enter into a CA under BCA 2016 (WA). The Minister is entitled to create a biodiversity conservation agreement, and the CEO of the Department of the Public Service⁶¹⁸ is authorised to create a biodiversity conservation covenant.⁶¹⁹ However, the laws in Australia do not provide for a holder of last resort. The possible reasons for this could be that: the power to create and hold a CA is exclusively reserved for certain public bodies, not a non-public one, and such bodies can work and administer a CA continually. Hence, there is no need to set this provision.

4.2 UK

Similar to Australia, all CA-enabling laws in the UK designate specific public bodies as a qualified holder. Some of them also entitle specified non-governmental bodies to be an eligible holder. However, none of them have any provision on a holder of last resort.

The statutes authorising the creation of management agreements confer the power to create this type of agreement on various governmental bodies, specifically those having primary functions in relation to conservation. However, local authorities can be a holder under some specific statutes. The crucial statutory conservation bodies eligible to conclude management agreements under various statutes are Natural England (NE), Natural Resources Wales (NRW), and Scottish Natural Heritage (SNH).⁶²⁰ Some statutes, for instance, WCA 1981, confer the power on local planning

⁶¹⁶ In brief, the process of creation of a CA in NSW involves discussion of the draft CA between the Office of Environment and Heritage (on behalf of the Minister for the Environment) and an eligible landholder. A draft CA is usually jointly developed and produced and agreed as a final document (Office of Environment and Heritage, 'Conservation Agreement' <www.environment.nsw.gov.au/cpp/ConservationAgreements.htm> accessed 14 May 2020).

⁶¹⁷ BCA 2016 (NSW), ss 5.5, 5.21 (2) and 5.27.

As authorised by BCA, the Biodiversity Conservation Trust (BCT) plays both administrative and contracting-party roles regarding private land conservation agreements. Its functions include providing assistance and education to landholders who propose to enter into agreements with BCT (BCA 2016 (NSW), s 10.5(1)).

⁶¹⁸ The term CEO under BCA 2016 (WA) means the Chief Executive Officer of the Department of the Public Service, stipulated under Conservation and Land Management Act 1984 (WA).

⁶¹⁹ BCA 2016 (WA), ss 114 and 122.

⁶²⁰ See Reid, *Nature Conservation Law* (n 35) paras 2.61 and 2.62.

authorities of each region where they seek to conserve or enhance the natural beauty or amenity of any land or promote its enjoyment by the public.⁶²¹

The legal techniques used for the creation of conservation burdens and conservation covenants employ a similar approach. Both of them set the specified conservation bodies as a default eligible holder.⁶²² However, local authorities and non-governmental organisations are eligible to be a qualified holder where they are designated by the Scottish Ministers (for conservation burdens) and the Secretary of State (for conservation covenants) subject to the conditions stipulated in TC(S)A 2003 and Environment Bill.⁶²³ The Environment Bill allows local authorities and other bodies to be a qualified holder (designated bodies). However, the designation as a qualified holder might subsequently be revoked where certain conditions have been met.⁶²⁴

Although the provision about the holder as a last resort does not expressly appear in those statutes implemented in the UK, TC(S)A 2003 provides a flexible rule akin to a holder of last resort. This legislation lays down the rule that where a holder can no longer hold a conservation burden, or where it is removed by the Scottish Ministers from the list of conservation bodies,⁶²⁵ the right to a conservation burden can be assigned or transferred to any designated conservation body or to the Scottish Ministers.⁶²⁶

4.3 USA

Unlike Australia and the UK, the US laws employ a different approach in dealing with a qualified holder. A general rule is that non-public bodies are entitled to be a qualified holder where they meet a qualification specified under each state law.⁶²⁷

The majority of the conservation easement state statutes in the USA employ similar language regarding the eligibility of qualified holder, but some details vary. UCEA offers guidance that eligible holders might be governmental bodies authorised by state

⁶²¹ WCA 1981, s 39(1) and (5)(c).

⁶²² The Scottish Ministers are set as a qualified holder for holding conservation burdens under TC(S)A 2003, s 38(1), and the Secretary of State is set as the qualified holder for conservation covenants under the Environment Bill, cl 104(1).

⁶²³ TC(S)A 2003, s 38(4)(5)(7); Environment Bill, cl 104.

⁶²⁴ Environment Bill, cl 104.

⁶²⁵ TC(S)A 2003, s 38(7).

⁶²⁶ *ibid* s 39.

⁶²⁷ In practice, non-public bodies play a significant role in conserving private-owned land by employing conservation easements (Cheever and McLaughlin (n 49) 109). See also NCED, 'Profile: Easement Holder Type and Access Status by State' <www.conservationeasement.us/state-profiles/> accessed 14 May 2020.

or federal laws to hold an interest in real property; quasi-governmental bodies or non-governmental bodies; and entities who possess the third-party right of enforcement.⁶²⁸ The rule of each state is similar to that spelt out by UCEA, but many of them elaborate the qualifications of eligible holders in slightly different ways. Most conservation easement-enabling statutes allow relevant or authorised governmental bodies at both federal and state levels to hold conservation easements. Some states, for instance North Carolina, broadly allow state agencies, counties and cities to be a holder.⁶²⁹ There is an exception in New Mexico which does not allow governmental bodies to be qualified holders.⁶³⁰

Regarding the qualifications of non-governmental bodies, various state statutes require non-governmental bodies to have their operating purposes in conserving certain features. For example, Rhode Island permits a charitable corporation, association, trust, or other entity to hold conservation easements if their purposes relate to the conservation of land or water areas or of a particular area.⁶³¹ Iowa and Michigan are the exceptions for this because qualified holders are not required to have conservation-related purposes.⁶³² Some states, including California and Oregon, enable some specified native tribes to hold conservation easements.⁶³³ Some states specifically require that eligible non-governmental organisations must be non-profit bodies or charitable trusts. Some others, including Colorado, allow for-profit organisations to be eligible to be a holder if they have at least one of their purposes relating to conservation.⁶³⁴

Another point to be examined is about a holder of last resort or a backup holder. This type of holder is created from the notion that perpetual conservation easements might be in danger of being abandoned where a non-public holder ceases to exist or dissolves.⁶³⁵ Hence, some provision should be made to tackle this problem by allowing the transfer of a conservation easement to a new holder. Pennsylvania provides that where a holder ceases to exist or dissolves, and there is no a willing successive holder, the municipality where the burdened property locates shall automatically become a

⁶²⁸ UCEA, s 1(2).

⁶²⁹ North Carolina, s 121-35(2).

⁶³⁰ New Mexico, s 47-12-2.

⁶³¹ Rhode Island, s 34-39-3.

⁶³² Iowa, s 457A.8; Michigan, s 324.2141.

⁶³³ California, s 815.3(C); Oregon, s 271.715(3)(c).

⁶³⁴ Colorado, s 38-30.5-104(2).

⁶³⁵ Levin (n 513) 40; Jeff Pidot, *Reinventing Conservation Easements (Policy Focus Report): A Critical Examination and Ideas for Reform* (Lincoln Institute of Land Policy 2005) 11.

successive holder.⁶³⁶ This position is similar to that of Virginia where the Virginia Outdoors Foundation will automatically hold such a conservation easement unless the instrument creating the easement otherwise provides for its transfer to some other holder or public body.⁶³⁷

4.4 An analysis

The examination of the three previous sections indicates that CA-enabling laws mainly designate specific public bodies to be a qualified holder. The role of non-governmental bodies, as a qualified holder, is apparent in some legislation, mainly in the USA. This reflects that governments play a vital role in environmental governance through the use of CAs. The points to be discussed below involve the role of non-governmental bodies as qualified holders, the approaches in designating eligible holders and holders of last resort. These discussions would suggest which approach might be suitable for Thailand and demonstrate how relevant actors come into play in the governance of CAs.

4.4.1 Advantages and disadvantages of designating of non-governmental bodies

The designation of non-governmental bodies as a qualified holder in the US laws and some laws in the UK can be discussed from many angles, including the advantages and disadvantages of designating non-governmental bodies to be an eligible holder. The advantages can be argued on several grounds. In the first place, allowing non-governmental bodies to be a qualified holder is an opportunity to promote governance by multiple players, in keeping with the global trend, which supports the management of natural resources using public-private participation.⁶³⁸ Second, there is a witness from the success of other conservation schemes that some non-governmental bodies are in the position to raise funds for implementing conservation schemes akin to CA implementation.⁶³⁹ This upside indicates that non-governmental bodies could acquire

⁶³⁶ Pennsylvania, s 5054(d).

⁶³⁷ Virginia, s 10.1-1015.

⁶³⁸ This notion can be seen from the international consensus found in Principle 10 of the Rio Declaration on Environment and Development, which declares that all States should encourage public participation in environmental issues.

⁶³⁹ This example can be observed from a conservation campaign running by the World Land Trust, a non-governmental conservation body based in the UK. This organisation uses funds from donations to buy land and support a local partner to manage the land by adopting a conservation method suitable for each area. See World Land Trust, 'Land Purchase' <www.worldlandtrust.org/what-we-do/how-we-work/land-purchase/> accessed 14 May 2020.

the funds from donation to encourage CA implementation if they are allowed to be a qualified holder. Third, the members of some of the non-governmental bodies can be those living in the local areas where CAs are sought to be implemented.⁶⁴⁰ Thus, it is likely that members of this type of body may have the capacity to encourage landowners to enter into a CA as well as encourage and help them to look after the burdened land better than that by a governmental body.⁶⁴¹ To exclude such a non-governmental body from being a CA holder may lose the opportunity to make the best protection of land or natural resource management.⁶⁴²

Nevertheless, allowing non-governmental bodies to hold a CA could have some danger. This includes the emergence of complexity in the rules in determining and governing non-governmental actors,⁶⁴³ and what to do when they can no longer hold a CA. Another danger could be concern over the achievement of public interest, accountability and transparency of a CA held by this type of holder.⁶⁴⁴ There might be problems on how to investigate the transparency of their work.⁶⁴⁵ It means that some additional governing rules must be added where the law makes those bodies holders. The justification of public spending could also be questioned where governments use public money to support non-governmental bodies.

4.4.2 Benefits and drawbacks of setting specified eligible holders

Another consideration extracted from the comparative study is about the approach to providing a range of qualified holders. The laws in place in Australia and management agreement-authorising statutes confer the power to make a CA on specified and fixed governmental bodies. The US laws and those authorising the creation of conservation burdens and conservation covenants in the UK represent another approach by allowing

⁶⁴⁰ The Woodland Trust, the largest woodland conservation charity in the UK, can be an example of non-governmental bodies having its members in local areas. Its membership of around 2,600 volunteers can conserve sites under the management of Woodland Trust in various ways, including giving scientific information to people in communities and carrying out management tasks. See Woodland Trust, 'Volunteer with us' <www.woodlandtrust.org.uk/support-us/act/volunteer-with-us/#> accessed 14 May 2020.

⁶⁴¹ See also the opinion of the Environment Bank, the Central Association for Agricultural Valuers and Professor Hodge in Law Commission (n 45) paras 4.42, 4.45 - 4.47.

⁶⁴² See the arguments made in Reid and Nsoh (n 17) 188; and that of the Environment Bank in Law Commission (n 45) para 4.45.

⁶⁴³ Adina Merenlender and others 'Land Trusts and Conservation Easements: Who is Conserving What for Whom?' (2004) 18 Conservation Biology 65, 75; Jessica Owley, 'Neoliberal Land Conservation and Social Justice' (2012) 1 IUCN Academy of Environmental Law e-Journal 6, 9.

⁶⁴⁴ Reid, 'The Privatisation of Biodiversity?' (n 493) 225.

⁶⁴⁵ Owley (n 643) 11; Holligan (n 72) 65.

those who are qualified to be a holder subject to the rules specified in each particular statute. This finding raises the discussion about the advantages and disadvantages in designating specified and fixed bodies as a qualified holder.

The obvious advantage is that it makes the legal structure of a CA-enabling law not too complicated. It is clear that the prescribed bodies under the law are entitled to hold a CA, and others are not. Additionally, the model of providing a specified eligible holder is convenient to monitor those who hold CAs.

Nevertheless, some disadvantages should be considered. Providing specified and fixed bodies reflects environmental regulation exclusively operating by a limited group of eligible bodies. Assuming that only the Minister for the Environment is entitled to do this task, there is no opportunity for other actors to be a holder, even though such a body could look after a CA better than the Minister.⁶⁴⁶ Such a single holder could be problematic in monitoring the compliance of a burdened landowner who has property in a remote area. It is also at risk of becoming out-of-date,⁶⁴⁷ where the qualified holders in the list have changed their tasks of operation. These disadvantages could demotivate a potential landowner to enter into a CA. One of the possible means in resolving these problems can be observed from the laws authorising the creation of conservation burdens and conservation covenants in the UK. They set specified governmental bodies as a qualified holder but allow such bodies to designate other appropriate bodies as a qualified holder, as observed in section 4.2 above.

4.4.3 Holders of last resort

The last point to be discussed is about the need for having the provision of holders of last resort or backup holders. As mentioned in the earlier paragraph, this kind of holder is exclusively found in the USA and the Scottish legislation. The need for this type of provision stems from the attempt to avoid the risk of having an abandoned conservation easement where a holder no longer exists or is unable to hold a conservation easement.⁶⁴⁸

⁶⁴⁶ Hodge commented on the Law Commission Report on this point that, in some cases, non-governmental bodies may be in a better position to hold a CA, as they are in a position to manage the resources efficiently (for example water companies) (see Law Commission (n 45) para 4.47).

⁶⁴⁷ Reid and Nsoh (n 17) 188.

⁶⁴⁸ Levin (n 513) 40-41.

On the one hand, setting a backup holder could help ensure that where one holder can no longer hold or look after a CA, other eligible entities can help continue this task.⁶⁴⁹ This would prevent the occurrence of an orphaned CA,⁶⁵⁰ where there would be a risk of non-compliance and no monitoring or assurance that the conservation ends would be achieved.

On the other hand, the dangers of setting a legal provision for a backup holder could be that first, it could make the governing rule of CA governance too complicated.⁶⁵¹ This can be observed from the opinion of Trowers and Hamlin LLP given in the Law Commission Report that “the rules that apply to the disposition of other interests in land should apply to the benefit of covenants about conservation”.⁶⁵² It might also look unnecessary where an eligible holder is exclusively reserved for a fixed governmental body with less chance of it ceasing to exist or collapsing.⁶⁵³ Another negative point could be that it could be inconsistent to the voluntary character of a CA where a certain body is required to take over an abandoned CA involuntarily, and this could impose a disproportionate burden in overseeing CAs on the bodies, who are designated to be this kind of holder.⁶⁵⁴

5. Burdened landholders

Although CAs mainly impose obligations running with the land on landowners, CA-enabling laws may provide further that those other than the owners are bound in CA obligations. This part will primarily examine who are the persons that CA-enabling laws require to be bound with the obligations agreed with a holder? The words ‘burdened landholder’ is used here as any person bound to fulfil an obligation on the land conserved by CAs.⁶⁵⁵ Landowners are in the primary position to enter into a CA with a qualified holder and become burdened landholders. A standard feature of CAs

⁶⁴⁹ Pidot (n 635) 11.

⁶⁵⁰ Levin (n 513) 41.

⁶⁵¹ Reid and Nsoh (n 17) 188.

⁶⁵² Law Commission (n 45) para 4.70.

⁶⁵³ Reid and Nsoh (n 17) 188.

⁶⁵⁴ Law Commission (n 45) para 4.76.

⁶⁵⁵ This attribute results from a common feature of CAs, which runs with the land and binds a future landowner. See Law Commission (n 45) para 1.1.

which run with the land means that the future landowners are also bound to fulfil CA obligations as burdened landholders even if they did not enter into the CA.⁶⁵⁶

This examination should be investigated separately because CAs impose obligations on burdened landholders regardless of whether such persons voluntarily enter into CAs, and it is necessary to consider who is this type of person under the laws of each jurisdiction. This point is also linked to other considerations, including those concerning the nature of the obligation and enforcement for the breach of obligations in parts 6 and 8. Without an examination of this matter, the investigations in other considerations would accordingly be problematic.⁶⁵⁷

5.1 Australia

Overall, the legal approach articulating who are burdened landholders under the Commonwealth law is slightly different from those of NSW and WA. While the laws of NSW and WA clearly state that landowners can be bound in CAs, the legal approach used for providing burdened landholders under the Commonwealth law is broader, including those who have rights affecting the features and value to be conserved.⁶⁵⁸ The Commonwealth legislation provides that where a conservation agreement is proposed to conserve or protect the natural features on land, eligible persons could also be an indigenous person where those people have a usage right relating to the land.⁶⁵⁹ This additional clause seeks to recognise the native title of indigenous people which stems from the traditional laws and customs of indigenous people rather than being recognised by a statute.⁶⁶⁰ It is important to note that in practice, the Commonwealth government has created conservation agreements with several public bodies or entities.⁶⁶¹ According to an online database of the Commonwealth government, the

⁶⁵⁶ As will be seen in part 10 below, several CA-enabling laws generally set the provision that a CA has a legal effect of binding successor landowners (or occupiers) when it is registered.

⁶⁵⁷ For instance, if there is no clear statement of who is bound to comply with an obligation in an individual CA, the issues who will be forced to comply where a breach of obligation happens (in part 9) and who is eligible to modify a CA (in part 12) will be unclear.

⁶⁵⁸ See the list of features or values to be conserved by conservation agreements in EPBCA 1999, s 305.
⁶⁵⁹ *ibid.*

⁶⁶⁰ The milestone of the recognition of native title and indigenous land rights can be traced back to the tension arising from the notion of *terra nullius* before 1992 and the recognition of native title in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also Bates (n 7) 663.

⁶⁶¹ These include the Conservation Agreement for the protection and conservation of Lowland rainforest of subtropical Australia at Palmview in Queensland and the Conservation Agreement for the protection and conservation of the Grey-headed Flying-fox (*Pteropus poliocephalus*) at Batemans Bay in NSW. See Department of the Environment and Energy, 'Conservation Agreements'

government has signed several conservation agreements with both state governments and regional councils.⁶⁶² However, the agreements do not clearly provide whether or not such state governments and regional councils entered into the agreements as an owner or holder of the land subject to the agreements.

Unlike EPBCA 1999, the regimes applied in NSW and WA explicitly specify persons who can enter into a CA. In NSW, landowners or public authorities who manage the Crown land are eligible to enter into private land conservation agreements with a designated holder.⁶⁶³ In WA, burdened landholders on a biodiversity conservation agreement are reserved for the owner and occupier of proposed land.⁶⁶⁴ The legal approach for a biodiversity conservation covenant, which is more formal in character, is reserved for a landowner.⁶⁶⁵ Again, the public authority is treated as a landowner for Crown land if such an authority is in charge of caring for, controlling or managing the land.⁶⁶⁶

5.2 UK

Similar to Australia, CA-enabling statutes in the UK generally provide who can be burdened landholders, but the language employed by particular statutes is different. Management agreement and conservation covenant-authorising statutes share various standard features, while TC(S)A 2003, which is the source of conservation burdens, has a unique approach.

The common feature of management agreements and conservation covenants authorising statutes is that landowners could be a burdened landholder.⁶⁶⁷ However, some of them allow landowners, lawful occupiers of the land and tenants of land to enter into CAs with qualified holders.⁶⁶⁸ Apart from that most of them clearly provide that CAs impose obligations running with the land, and bind a successor in title. For example, CHSR 2017 and NERCA 2006⁶⁶⁹ employ similar language that a

<www.environment.gov.au/protection/environment-assessments/conservation-agreements> accessed 14 May 2020.

⁶⁶² A full version of this Agreement can be accessed from Department of the Environment and Energy, *ibid.*

⁶⁶³ BCA 2016 (NSW), s 5.9(2).

⁶⁶⁴ *ibid* s 114(1).

⁶⁶⁵ *ibid* ss 122(1) and 129.

⁶⁶⁶ *ibid* s 5.

⁶⁶⁷ For example, see CHSR 2017, reg 20(6); NERCA 2006, s 7(6), Environment Bill, cl 102.

⁶⁶⁸ CA 1968, s 15.

⁶⁶⁹ NERCA 2006, s 7(3).

management agreement binds persons deriving title under or from the person with whom the appropriate nature conservation body makes the agreement.⁶⁷⁰

In contrast to management agreements, TC(S)A 2003 does not state who can enter a conservation burden with a holder. However, the Act generally provides that real burdens, which include a conservation burden, can be granted only by or on behalf of the owner of the land, which is to be the burdened property.⁶⁷¹ This binds a future landowner.

5.3 USA

Conservation easement-enabling statutes in the USA employ a similar approach to those of Australia and the UK in that all of them entitle an owner of real property to create conservation easements.

Although UCEA does not state who can be a burdened landholder, the legal content found in ss 2(d) and 3(a)(1) implies that a landowner can create and will be bound by conservation easements. Several UCEA states also employ a similar language.

The language used for this matter in non-UCEA states is varied. Kansas states that a conservation easement may be created only by an owner of the surface of the land.⁶⁷² This is similar to Colorado, where the law explicitly states that owners of the land or the water or water right are entitled to create a conservation easement.⁶⁷³ Illinois broadens burdened landholders to a contract purchaser, a lessee, and a life tenant.⁶⁷⁴

5.4 An analysis

5.4.1 Burdened landholders from the dimension of the types of land-related rights

One of the findings from the previous sections illustrates that the laws in some jurisdictions clearly provide who are the burdened landholders, but some others do not.

⁶⁷⁰ CHSR 2017, reg 20(4).

⁶⁷¹ TC(S)A 2003, s 4(2)(b).

⁶⁷² Kansas, s 58-3811(a).

⁶⁷³ Colorado, s 38-30.5-104.

It is important to note that the legal regime of water rights of Colorado is unique as this state developed its own rule, namely the Colorado Doctrine. This Doctrine entitles an eligible person to own water rights (see Charles E Gast, 'Colorado Doctrine of Riparian Rights and Some Unsettled Questions' (1898) 8 Yale Law Journal 71). This could be one of the reasons explaining why an owner of water rights is explicitly spelt out as one of a person eligible to be a burdened landholder.

⁶⁷⁴ Illinois, ss 2 and 3.

Several CA-enabling laws explicitly state that landowners are eligible to be burdened landholders, and some others allow land tenants or other persons who have property rights affecting the management of property to do the same task.⁶⁷⁵ This finding raises the question ‘should persons other than a landowner be entitled to be a burdened landholder?’ The answer to this question would help elaborate the scope of burdened landholders for the Thai context, where land can be publicly-owned and privately-owned with a complicated regime.

As all CA-enabling laws entitle a landowner to be a burdened landholder, this discussion should start from what are the reasons for this? The primary justification could be that a CA is primarily created to conserve some features on land, and the landowner is the person who has an absolute right over such land or property.⁶⁷⁶ Thus, they should be in an appropriate position to decide whether to enter into a CA, and it is sensible to confer this right on them since a CA imposes obligations against the right to enjoy ownership on the property.

However, some CA-enabling laws confer the right to create a CA on a holder of other property rights, including water, mineral, hunting rights, and the holders of these type of right might be affected by CA implementation. For example, a person having fishing right over water bodies might be restricted or prohibited from fishing as a result of a CA burden to maintain the population of fish in a particular area. This gives rise to the question of whether other owners of these types of property rights should be eligible to create and be bound by a CA. This discussion considers the case of water rights as a representative of subsidiary rights that can be held separately from the land.⁶⁷⁷

⁶⁷⁵ This thesis acknowledges that there are some differences in the recognition of land-related rights between different jurisdictions and legal systems. For instance, there is a meaningful difference between common law and civil law property systems due to the fact that common law systems generally do not have a unitary concept of ownership (which means that it may be easier to recognise holders of rights other than full ownership as able to burden land). The variety of approaches in recognising such rights might suggest that different underlying frameworks will be able to accommodate different parties being bound by CAs in different ways. The purpose of this sub-section is to provide a more general discussion about the benefits and drawbacks in recognising different kinds of land-right holder as being eligible to be burdened landholders, without full examination of different conceptions of ownership.

⁶⁷⁶ This is because a landowner holds ownership on land, and ownership is the most extensive right in respect of an item of property. See C G Van der Merwe, Marius Johannes De Waal, *The Law of Things and Servitudes* (Butterworths 1993) para 9; Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (4th edn, Bloomsbury 2015) 201; Reid, *Nature Conservation Law* (n 35) para 5.1.6.

⁶⁷⁷ The reason for making use water rights as an example is because it is mentioned in various conservation easement enabling laws of various states in the USA.

The starting-point here is the notion that in the countries employing the riparian doctrine, a person having ownership of land may hold a riparian right⁶⁷⁸ and other types of water rights.⁶⁷⁹ These water rights,⁶⁸⁰ arguably, are not part of land ownership *per se*, and they are governed by different rules. Some state laws in the USA are an example of the jurisdiction officially recognising water right holders to be eligible to create a conservation easement.⁶⁸¹ One of the advantages of setting a clear provision endorsing owners of other interests in real property can be that it would increase the chance of using a CA to protect a watercourse, surface runoff and groundwater. To provide such a clear provision could be helpful because it extends CAs to persons who hold water rights but do not own a piece of land, specifically the locals who live in an upstream river for the conservation of water for ecological reasons. However, there might need to provide a clear condition on what types of interest in real property should be considered as similar to ownership of land.

Another point worth determining is whether other persons who possess the land, viz. land tenants, should be eligible to enter into a CA.⁶⁸² In general, persons who have no ownership should not create any burdens on land, specifically those running with the land for a long period, because this would negatively affect the ownership rights of a landowner.

However, this view might hamper the possibility to conserve nature by implementing a CA. Some scholars support a person holding a right less than full ownership to be able to pursue a conservation goal by concluding a CA, and a tenant is an example of this type of person.⁶⁸³ Assume that C, an owner of farmland, entered into a 50-year lease agreement with D. Then, a government initiates a CA scheme to encourage those who holds arable land to conclude a 20-year conservation agreement. In this case, C may not be interested or be unable to enter into the agreement because his land is under

⁶⁷⁸ At the core of riparian rights is the right of a landowner to draw water over an adjacent waterway (Richard Macrory, *Water Law: Principles and Practice* (Longman Professional 1985) 8; David H Getches, *Water Law* (4th edn, Thomson West 2009) 4; Sarah Hendry, *Frameworks for Water Law Reform* (CUP 2014) 37).

⁶⁷⁹ For example, the right of landowners of surface runoff on their property and right to extract groundwater (Alex Gardner, Richard Barlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths 2009) 152-62).

⁶⁸⁰ The term water rights is used here in a broad meaning, which covers a wide range of rights to access and use water (see Hendry (n 678) 36).

⁶⁸¹ See the law of Colorado in the previous section.

⁶⁸² See the discussion of whether a tenant should be eligible to make a conservation covenant in Law Commission (n 45) paras 5.2-5.16.

⁶⁸³ Reid, 'Employing Property Rights for Nature Conservation' (n 84) 176.

the lease contract. Where the law does not allow a land tenant to enter into a conservation agreement, D would be ineligible to conclude the agreement to conserve feature on the land.

Biodiversity conservation agreements in WA and management agreements in the UK are examples where a land tenant or other type of occupier can be bound in a CA. This might be possible for a short-term agreement because an agreement created by those who are not landowners should not be created exceeding the terms of a right they have on that land. Other possible conditions could be that a landowner must consent to create this type of agreement, which is used in some jurisdictions.⁶⁸⁴ Otherwise, the law may require a landowner to ensure that terms of a CA obligation are part of any subsequent lease, so that the terms of the CA are observed whoever is in occupation.

5.4.2 The legally binding effect on future landowners

Although the ability to impose obligations running with the land and bind future landowners is a crucial feature of CAs, not all CA-enabling laws explicitly cover this in detail. Hence, it is worth visiting here the benefits and drawbacks of expressly providing whether future landowners are bound in CA obligations. Setting an explicit provision as to who are bound in CAs, as seen from the Scottish legislation and some conservation easement-enabling statutes, looks desirable because it clarifies who are bound to fulfil CA obligations. Some others might oppose this view because setting simply a general rule that a CA runs with the land is sufficient because CAs imposes obligations to those having interests in the land. Setting a detailed provision might be unnecessary for a short-term CA, which seek to bind an owner of the land who enters into this type of arrangement, or where the land subject to a CA is publicly-owned land under the management of governmental bodies.

As CAs can impose positive or negative burdens on future owners or occupiers, the discussion of the extent to which CAs bind such future owners and occupiers is interconnected with that about the binding effect of positive obligations on successive landowners and occupiers. However, this consideration requires the examination of the obligations imposed by CAs. Hence, this point will be examined as part of the next topic.

⁶⁸⁴ In the UK, the Agriculture Act 1986, s 15(2) requires land tenants to notify their landlords when they enter into management agreements with competent bodies or authorities.

6. Obligations

The examination in part 6 of chapter 1 revealed that the ability of CAs to impose obligations on the burdened landholder when the land changes hand is one of the critical features worth examining. Thus, it is necessary to examine how each jurisdiction provides for the obligations to fulfil a CA. The word ‘burden’ will be occasionally used as an interchangeable term of the word ‘obligation’, mainly, where it is used in the context of the laws in the USA and Scotland.⁶⁸⁵

As the laws of each jurisdiction provide different patterns and normative content of CA obligations, this part does not portray the content of obligations of every jurisdiction but rather highlights some noteworthy points, reflecting strengths and weaknesses of each legal model. Key points to be examined are whether and to what extent each CA-enabling law makes legal provision concerning the obligation of CAs. CA obligations are categorised here into negative and positive obligations. The first imposes a duty not to do a certain task, e.g. the obligation to refrain from clearing land. The latter involves setting a requirement to a burdened landholder to oblige such a person to do some activities, for example, to dig an artificial swamp to create a new ecosystem.⁶⁸⁶

Another point to be examined is about the legal effect of CA obligations. This will consider whether the laws have any provisions dealing with the legally binding effect arising from the nature of CAs in imposing obligations running with the land. For instance, it will examine whether CAs under a particular statute stipulate that positive obligations bind future landowners.

6.1 Australia

Overall, CAs under both Commonwealth and state laws use a similar approach to formulate CA obligations. They impose both negative and positive burdens on burdened landholders, but the subject matter of the obligations is varied subject to the purposes of implementation of each particular CA.

⁶⁸⁵ The reason for this is because CAs in these two jurisdictions are not an agreement creating a statutory obligation, but rather create a property right imposing some burdens on the burdened landholders.

⁶⁸⁶ See this characterisation at TC(S)A 2003, s 2.

The Commonwealth legislation creates obligations for a conservation agreement to protect or conserve the features or values explained in section 2.1 above. Burdened landholders might be obliged to comply with positive or negative obligations, for instance, to carry out agreed activities to promote the conservation of biodiversity, to restrict the use of the area under the agreement, and to require the owner to contribute towards costs incurred in implementing the agreement.⁶⁸⁷

CAs in NSW and WA employ a similar approach. They provide that CAs may impose both affirmative and negative obligations on burdened landholders, but the details of specific duties might be different depending on the particular type of CA. Negative burdens can be imposed to restrict the use or development on the land under CAs. Positive ones may involve the duty of a burdened landholder to carry out specified actions on the land, and to permit specified persons to enter into the land, to satisfy monitoring, reporting and audit requirements. Apart from that, as CA-enabling laws of NSW and WA may support entering into a CA with financial assistance, they provide an additional duty to require a burdened landholder to repay money to a holder where they fail to fulfil the agreement.

Regarding a legally binding effect on the successors of land title, CAs created under both the Commonwealth and state laws are binding on, and enforceable by and against, the successors in title. This includes a legally-binding effect on a lessee.⁶⁸⁸

6.2 UK

Overall, CAs in place in the UK share a similar character in that they can impose both negative and positive obligations on burdened landholders, but the legal approaches regarding the creation of obligations are slightly distinctive as examined below.

The obligations created by management agreements are varied subject to their sources of legal authorisation. Negative obligations might be restrictions on the exercise of rights over the land; positive ones may involve carrying out work to fulfil the purpose of conserving those flora, fauna or geological or physiographical features.⁶⁸⁹ Another interesting point of management agreements is that they may contain provisions on

⁶⁸⁷ EPBCA 1999, s 306(2).

For instance, some conservation agreements require their parties to pay their own costs of negotiating, preparing and executing this Agreement (see cl 8.5 of the Conservation Agreement for the protection and conservation of Lowland rainforest of subtropical Australia at Palmview, Queensland (n 182)).

⁶⁸⁸ EPBCA 1999, s 307; BCA 2016 (NSW), ss 5.13, 5.24 and 5.31; BCA 2016 (WA), ss 118 and 129.

⁶⁸⁹ For example, see CHSR 2017, reg 20(3); NPACA 1949, s 16(2)(3)(5).

making payments to the persons who are bound to do the tasks, in exchange for entering the agreement.⁶⁹⁰

In contrast to management agreements, although conservation burdens may provide negative and affirmative obligations,⁶⁹¹ there is no detailed provision about the actions that can be imposed as an obligation. Nonetheless, it does not mean that this type of CA can be created to impose a broad scope of obligation since the obligation must be created to achieve the purposes set forth under s 38 of TC(S)A 2003 as examined in section 2.3 above.

The Environment Bill employs an approach similar to TC(S)A 2003 in relation to CA obligations. Conservation covenants under the Environment Bill may be created to require landowners to do or not to do something on land as well as to allow or require a holder to do something on land.⁶⁹²

The last point to be noted entails the legal effects of the burdens running with the land. TC(S)A 2003 and the Environment Bill set a similar rule on who is bound in each type of obligation. While negative burdens directly bind the successive landowners and occupiers, the position for positive ones is more complicated.⁶⁹³ This point raises some interesting discussion as will be discussed in the latter section.

6.3 USA

Overall, both UCEA and the majority of state statutes provide that conservation easements may impose both negative and positive obligations. However, some of them do not enunciate what the obligations for fulfilling conservation easements are.

The UCEA and most UCEA state statutes⁶⁹⁴ use very similar language in providing the meaning, purposes and types of obligation. These components usually are articulated simultaneously that a ‘conservation easement means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include ...’⁶⁹⁵ Apart from that, UCEA and many UCEA state statutes maintain that a conservation easement might create both a negative or

⁶⁹⁰ This provision can be seen in CHSR 2017, reg 20 (3); NERCA 2006, s 7 (2); CA 1968, s 15 (3); NPACA 1949, s 16 (3); WCA 1981, s 39(2).

⁶⁹¹ TC(S)A 2003, s 2.

⁶⁹² Environment Bill, cl 102(2).

⁶⁹³ See TC(S)A 2003, s 9; Environment Bill, cl 107(2)(5).

⁶⁹⁴ Except for Florida, which employs a different approach as explained below.

⁶⁹⁵ UCEA, s 1(1),

affirmative obligation, and the latter one is exclusively imposed on an owner of the burdened real property and a holder. Florida is distinctive from other UCEA states in that it only allows the creation of various restrictive burdens, but not positive ones.⁶⁹⁶ In contrast to the regime of UCEA and UCEA-state statutes explained above, the obligations under non-UCEA state statutes are varied. Some provide an extensive list of activities that can be set as obligations and purposes of a conservation easement; many mention this point with a few words. Another point to be noted is that some of the non-UCEA states do not mention any positive obligation. It can be interpreted that these states mainly use a conservation easement for prohibiting, limiting or restricting activities carried out on land, rather than to require a burdened landholder to conduct active practices on the land. For instance, Montana uses a conservation easement to limit or prohibit excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance, among other things.⁶⁹⁷ This is similar to the position in New York⁶⁹⁸ and North Carolina⁶⁹⁹ where a conservation easement can only impose an obligation to forbid, limit or restrict the development, management or use of real property, but there is no word explicitly allowing an affirmative duty.

6.4 Legal implications of distinctive approaches regarding types and scope of CA obligation

The examination in the previous sections indicates that the comparator jurisdictions use different approaches in dealing with the obligations for fulfilling the purpose of a CA, but they share some characteristics. For instance, the majority of CA-enabling laws allow the creation of CAs which impose both negative and affirmative obligations. However, their substantive content remains varied subject to the purposes of the implementation of a particular CA. The differences among them make some interesting points and should be further discussed as follows.

6.4.1 Scope and detail of obligations

Regarding the normative content and types of obligations, some jurisdictions, as mentioned, divide affirmative and negative obligations from each other, some provide a detailed and extensive list of obligations, while some elaborate an obligation based

⁶⁹⁶ Florida, s 704.06(1).

⁶⁹⁷ Montana, s 76-6-203(4).

⁶⁹⁸ New York, s 9-0303.1.

⁶⁹⁹ North Carolina, s 121-35.

on the purpose and nature of a CA with a very brief provision. Some others may not explicitly state what a CA can prescribe on the exact features of an obligation. Such variation demonstrates that the legal approach regarding an obligation can be categorised as the one employing an exhaustive approach and another with a short provision. This raises the question, what are the strengths and weaknesses, if any, of each approach?

As seen from the provision under UCEA, the obligations and purposes of a conservation easement are provided as part of the definition of a conservation easement. This looks attractive where a conservation easement-enabling law is enacted to be a mere framework statute for recognising the legally binding effect of this type of instrument and leave room to prospective parties to negotiate what obligations should be concluded subject to that framework provision.⁷⁰⁰ The positive side of this approach is the flexibility in arranging the terms of a CA. It leaves room for a qualified holder and landowner to negotiate a specific obligation in light of the primary purposes of CAs prescribed in a CA-enabling law. However, a loose approach could be problematic in some aspects. These include where CAs are introduced to achieve a specific end of C&C regulation as observed from management agreements related to establishing an SSSI in the UK.⁷⁰¹ Without a detailed provision prescribing what types of obligation can be created, it remains unclear whether and how these CAs would achieve the aim of their creation.

An extensive and exhaustive approach commonly involves setting legal guidance on what should be or can be created as CA obligations. It is advantageous in that the parties do not need to consider what should be created as they can take the instant obligations from a prescriptive list under a CA-enabling law to create the content of a CA. A CA under a detailed CA-enabling law could be easier to monitor and assess in terms of successful implementation rather than leaving room to create an individual arrangement by the parties. Nevertheless, this may look undesirable because the exhaustive detail in the legislation may result in difficulty in the use of a CA for a broader purpose and inability to adapt the specific terms of a CA where change

⁷⁰⁰ See the benefits and drawbacks of drafting a CA with more specific substantive terms as discussed in Reid and Nsoh (n 17) 200-201.

⁷⁰¹ See this illustration in section 2.2 above.

happens in the future.⁷⁰² Having a fixed ‘menu’ may also not be attractive to prospective landowners considering entering an agreement.

6.4.2 Strengths and weaknesses of CAs reliant on negative obligations

Although the introduction of CA-enabling laws in some jurisdictions partly arose from the need to broaden the scope of obligations imposed on land to cover positive obligations, the laws of some states in the USA merely impose a negative obligation. This feature engenders the discussion on whether CA-enabling laws which merely impose negative burdens, but not positive ones, are desirable or not.

On the one side, some might insist that a mere restrictive obligation might be insufficient to make a CA successful. For instance, if a prospective holder seeks to set aside a piece of privately-owned land for public access for a recreational purpose, this type of purpose may not only require permission from a landowner but also obligate the landowner to clear some parts of the land for a pathway and ensure that it is safe for walking across that land. This requires an affirmative obligation to clear vegetation *per se*. As exemplified in sub-section 1.2.3 of chapter 4, if the Thai government was proposing to encourage eco-friendly practices on farmland, imposing both negative obligations (e.g. not to use dangerous chemicals in farming processes) and affirmative ones (e.g. to plant native trees), implementing CAs might be desirable. Apart from that, some commentators argue that preserving some types of land without requiring any active management may be inadequate because it does not help maintain the balance of ecosystems at an appropriate level.⁷⁰³ As a result, imposing both affirmative and restrictive obligations could be more desirable.

On the other side of the coin, some might argue that setting a CA-enabling law with an ability to impose positive obligations could come along with costs for implementation. This could give rise to the question of who will bear the costs, and whether a holder will help support the fulfilment of such active operations. Positive obligations may also demotivate landowners from entering into a CA, particularly where the costs of operation are high. Additionally, setting the rule recognising the creation of positive obligations could give rise to complexity of the governing rules. For instance, it might be questionable who will be bound to fulfil positive obligations,

⁷⁰² Reid and Nsoh (n 17) 200. See the discussion of how some change in the future may affect the fulfilment of CA obligations in section 7.4 below.

⁷⁰³ Jessica Owley, ‘Conservation Easements at the Climate Change Crossroads’ (2011) 74 Law and Contemporary Problems 199.

and whether those who are not landowners but occupy land as a lessee are bound in this type of obligation.

6.4.3 The binding effect of positive obligations on successive landowners and occupiers

Although providing positive obligations is advantageous for several reasons, it may require an additional provision to govern who will be bound by such positive burdens where the land changes hands. The comparative study above demonstrates that some CA-enabling laws, for example, those authorising the creation of biodiversity conservation agreements in Australia, provide that both positive and negative obligations bind the future landowners and tenants. This is different from those authorising the creation of conservation burdens and conservation covenants in the UK, which provide that positive obligations do not bind the future occupiers, e.g. land tenants. This means that if a landowner agrees not to change the woodland to other types of land use, and plant more trees, and then leases the land under this covenant, the obligation not to change the land-use pattern binds a lessee, but that requiring to plant more trees does not.

The Australian approach looks attractive in that there is no need to interpret whether an obligation in question is a positive or negative burden, and who is bound in such an obligation because they are under the same rule. This is the opposite to the UK model where some statutes provide an additional rule that positive burdens exclusively bind the landowner, and not for land tenants. The UK approach looks attractive as it is clear that persons who are not a landowner may not be bound to fulfil positive obligation directly imposed by a CA-enabling law.⁷⁰⁴

7. Durations

This part investigates whether each selected CA-enabling law sets the provision about the binding duration of CA as in perpetuity or for a limited term. This issue is worth considering as it indicates whether or not CAs can be implemented to secure long-term conservation. The need to secure a long-term or perpetual binding effect is linked to the central element of a CA in imposing obligations running with the land, as partly

⁷⁰⁴ It is noteworthy that although s 9 (2) of TC(S)A 2003 and s 107(5) of Environment Bill do not impose any positive burdens on land tenants, burdened landowners may then agree with the tenants obliging the latter to fulfil the positive burdens under a contractual obligation.

discussed in part 5 above. This legal matter is closely linked to the provisions for modification and termination.⁷⁰⁵ Apart from that, as the physical nature of land plots in Thailand is relatively small compared with those of the comparator jurisdictions, this makes the examination about the range of binding durations, their strengths and weaknesses crucial for the development of a legal proposal for Thailand.

The legally binding period of CA is one of the points making this tool different from a mere private contract. While the latter commonly binds the parties with a specific and limited time and comes to an end when either party dies or ceases to exist, the former could impose burdens on burdened landholders and last in perpetuity.⁷⁰⁶

7.1 Australia

Australia represents the jurisdiction where the binding periods of a CA under the Commonwealth and state laws are varied. They can be those running in perpetuity,⁷⁰⁷ with a limited period and without specifying the provision about a binding term.

CAs running in perpetuity can be observed in biodiversity stewardship agreements in NSW. As mentioned in part 1, this type of agreement has a unique character as a legal tool based on a market-based instrument for securing biodiversity values. It is not surprising that BCA 2016 (NSW) sets a fixed rule, making them run with the land in perpetuity.⁷⁰⁸ Nonetheless, they can be varied or terminated subject to the conditions stipulated under the law.⁷⁰⁹

Another category of CAs is those which may last for a limited period. CAs in this category can be observed in conservation agreements and wildlife refuge agreements in NSW,⁷¹⁰ and biodiversity conservation covenants in place in WA. They have a

⁷⁰⁵ Reid and Nsoh (n 17) 189.

⁷⁰⁶ Environmental Law Institute (n 512) 21.

⁷⁰⁷ As will be observed in section 9.1 below, perpetual CAs under the law of NSW are attractive in offering landowners, who entered into this type of arrangement, to be eligible to claim a tax benefit.

⁷⁰⁸ BCA 2016 (NSW), s 5.10(2).

⁷⁰⁹ *ibid* s 5.11. See further examination in this point in section 11.1 below.

⁷¹⁰ In practice, the Biodiversity Conservation Trust offers two options for the binding period for a prospective landowner interested in entering into a conservation agreement. The first is a term agreement with a minimum of 15 years; the latter is a perpetual agreement. The binding term for a wildlife refuge agreement is not indicated, but it is a non-permanent agreement subject to the period being negotiated (see Biodiversity Conservation Trust, 'Wildlife Refuge and voluntary Conservation Agreements - Resources' <www.bct.nsw.gov.au/wildlife-refuge-and-voluntary-conservation-agreements-resources> accessed 14 May 2020).

similar governing rule in running with land in perpetuity or for the period set out in the agreement⁷¹¹ and the latter take effect until terminated.⁷¹²

The Commonwealth law provides a distinct rule from the state laws because this legislation does not explicitly state whether a CA lasts in perpetuity or with a limited duration. In practice, many CAs made by the Commonwealth government and other eligible parties have included both those concluded with an open-ended term⁷¹³ and those binding for a limited period.⁷¹⁴ But they usually come with the clause that the termination can be made by agreement between the parties or by order subject to the conditions prescribed in EPBCA 1999.

7.2 UK

Management agreements, conservation burdens and conservation covenants implemented in the UK have different binding periods. These three types of CA can be created for a limited period or run with the land permanently subject to the purposes of implementation.

The majority of management agreements are created for specific purposes and their binding periods vary accordingly. While many enabling statutes do not state explicitly their binding terms, some provide that management agreements may last with a specified term or without limitation of the duration of the agreement.⁷¹⁵ In practice, most of them are limited and short-term agreements and they may last up to twenty years.⁷¹⁶ This leaves room to the parties to negotiate and agree on an appropriate term. Conservation burdens employ a different approach from that of management agreements. They set a default binding period to run with the land permanently, but a

⁷¹¹ BCA 2016 (NSW), s 5.23(3).

⁷¹² *ibid* s 5.30; BCA 2016 (WA), s 122(2).

⁷¹³ This can be seen from conservation agreements created to protect and conserve *Quassia bidwillii* (one of the vulnerable native plants found in Queensland and NSW), and that to protect and conserve the Grey-headed Flying-fox (*Pteropus poliocephalus*). The full versions of these Agreements can be accessed from Department of the Environment and Energy (n 661).

⁷¹⁴ Again, this type of agreement can be observed from the conservation agreement to protect an area under the Tasmanian Forests Intergovernmental Agreement (see *ibid*).

⁷¹⁵ WCA 1981, s 39.

⁷¹⁶ This can be observed from a specific programme, including those under Higher Level Stewardship Programme which lasted for ten years (Reid, 'The Privatisation of Biodiversity?' (n 493) 211; Rodgers, *Law of Nature Conservation* (n 493) 302).

The Wildlife Enhancement Scheme (WES) initiated for protecting the land notified as SSSIs by Natural England is an example of a short-term management agreement. It usually runs for three to four years and does not bind non-parties of the agreement (Rodgers, *Agricultural Law* (n 490) paras 13.121 and 13.127).

limited-term burden is possible if it is specified in a constitutive deed.⁷¹⁷ This approach is then followed by a conservation covenant under the Environment Bill, whereby conservation covenants can be made with a limited period subject to the negotiation. Apart from that, if the eligible land is under a lease, its binding period may last up to the period of the lease.⁷¹⁸

7.3 USA

The USA exemplifies a jurisdiction having a variety of binding periods under state statutes. While a fixed-term conservation easement can be made in some states, a perpetual conservation easement is popular due to the requirement of tax regimes under both federal and state levels.

UCEA, as a model law, provides that conservation easements are unlimited in duration unless provided otherwise in the instrument creating them.⁷¹⁹ Several states adopt this model.⁷²⁰ Nevertheless, some states provide different terms. For instance, California, Florida, and Hawaii require that conservation easements must be perpetual in duration.⁷²¹ Some states set the default term in perpetuity, but permit a limited period. Colorado, Iowa and Nebraska are the examples of this category.⁷²² Some states provide the minimum term of conservation easements. For instance, Montana sets the minimum term as 15 years.⁷²³ Pennsylvania and West Virginia do the same at 25 years.⁷²⁴ Alabama allows creating a fixed period conservation easement which lasts at least 30 years or for the life of the grantor.⁷²⁵ Kansas set a default period as the lifetime of the grantor and it may be revoked at the grantor's request.⁷²⁶ Some states, including New Jersey, have no provision on the duration of an easement. The legal model of Maine is developed further in this matter. It sets a default binding period as a perpetual agreement, but allows a change of the term where circumstances have changed and the

⁷¹⁷ TC(S)A 2003, s 7.

⁷¹⁸ Environment Bill, cl 106.

⁷¹⁹ UCEA, s 2(c).

⁷²⁰ This provision can be found in the conservation easement-enabling statutes of many UCEA states, including Georgia, Idaho and Mississippi.

⁷²¹ California, s 815.2(b), Florida, s 704.06(2), and Hawaii, s 198-2(b).

⁷²² Colorado, s 38-30.5-103(3); Iowa, s 457A.2; Nebraska, s 76-2,115.

⁷²³ Montana, s 76-6-202.

⁷²⁴ Pennsylvania, s 5054(d) and West Virginia, s 20-12-4(c).

⁷²⁵ Alabama, s 35-18-2(d).

⁷²⁶ Kansas, s 58-3811(d).

fulfilment of the conservation easement no longer serves the public interest as determined by the court.⁷²⁷

It should be noted that although many states set a default binding period to last in perpetuity,⁷²⁸ they authorise the court to determine whether a particular conservation easement should be modified or terminated under specific rules. This consideration will be discussed in section 11.3 of part 11 below.

7.4 Strengths and weaknesses of various approaches in relation to the binding durations of CAs

The laws examined above illustrate that the majority of CAs set a default rule to run with the land in perpetuity, but the variation and termination of this type of CA are possible, subject to the conditions set under the laws.⁷²⁹ Some of them have a fixed term of legally binding period, both long and short-term agreements. A handful of them do not provide any provision about a binding period. The strengths and weaknesses of perpetual and fixed-term CAs are worth discussing together, while those for CAs having no binding duration should be discussed separately.

Perpetual CAs could look more appealing than fixed-term ones in two regards. The first is when they are considered from the perspective of achieving conservation aims requiring long-term conservation. A perpetual term is advantageous in that it helps conserve some natural or cultural features in the long run.⁷³⁰ A permanent agreement, seeking to keep a certain piece of the property as woodland, secures such land from being changed to a factory site forever. Additionally, this might be desirable for some conservation practices, including for carbon sequestration by trees or for the creation of ecological communities where it requires many decades to reach maturity level.⁷³¹ Also, it conforms to the notion of conserving natural features to serve the benefit of communities examined in chapter 2, where a certain community value should be conserved for future generations.⁷³² In contrast, a fixed-binding term could create a risk of failing to achieve a long-term conservation purpose. It might not be suitable to

⁷²⁷ Maine, s 3.

⁷²⁸ In practice, many conservation easements are created to bind in perpetuity. This practice has been influenced by the federal and state-tax rules which require a grant in perpetuity to attract a tax break (Cheever and McLaughlin (n 49) 113).

⁷²⁹ See the examination of variation and termination in part 11 below.

⁷³⁰ Reid and Nsoh (n 17) 44-47, and 189.

⁷³¹ *ibid* 44.

⁷³² Ogus (n 99) 54; Gillespie (n 133) 96-110.

secure forestlands used to store carbon dioxide to deal with global warming and climate change resulting from greenhouse gases in the atmosphere.⁷³³

The second one is about the costs and risk arising from CA initiation and implementation. As a perpetual CA is a one-off agreement, there is no need to renew or renegotiate this type of arrangement. This not only reduces some transaction costs⁷³⁴ but also the risk of uncertainty whether a new landowner will continue a CA for the land in question or not.⁷³⁵ This, however, is not the case for a fixed-term CA, which could be costly because of the requirement of renewal and renegotiation.⁷³⁶ At the same time, a fixed-term CA could impose the risk of failure in dealing with a CA renewal because a landowner at the time of its expiry may not desire to continue implementing a CA in the land.

Nonetheless, fixed-term CAs are more desirable than perpetual CAs when considering the aspect of the attractiveness to prospective landowners and the fairness to future landowners. The limited-term CAs look attractive in that they allow landowners to decide how long they will be bound by such a CA and have a choice to manage the land with other means after the termination of a CA. This cannot be made where the landowners enter into the perpetual CAs. This type of CA also looks disadvantageous in that the right to use the land is limited or restricted by a current landowner,⁷³⁷ which means that future landowners are unable to manage their land where it is inconsistent with the obligations by which they are bound.⁷³⁸ For this reason, landowners tend to prefer a short-term or a fixed period for a CA.⁷³⁹

⁷³³ REDD+ (Reducing Emissions from Deforestation and forest Degradation) is an example of the scheme introduced to tackle the increase in carbon dioxide in the atmosphere. This scheme requires an eligible participant, which includes a landowner, to plant trees on a certain area. Such trees act as a sink for carbon dioxide. This scheme will be secured where trees in a participating area are not cut down to prevent carbon dioxide leakage (Rosemary Lyster, Catherine MacKenzie and Constance McDermott (eds), *Law, Tropical Forests and Carbon the Case of REDD+* (CUP 2013) 32-7).

⁷³⁴ Bayers and Ponte (n 512) 190; Barton H Thompson, 'The Trouble with Time: Influencing the Conservation Choices of Future Generations' (2004) 44 *Natural Resources Journal* 601, 613-14.

⁷³⁵ Jessica E Jay, 'When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements' (2012) 36 *Harvard Environmental Law Review* 1, 37-43; Jessica Owley and others, 'Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools' (2018) 95 *Denver Law Review* 727, 731.

⁷³⁶ Jeff Jones and others, *Common Questions on Conservation Easements* (Center for Collaborative Conservation 2009) 13.

⁷³⁷ Reid and Nsoh (n 17) 190; Colin T Reid, 'Conservation Covenants' (2013) 77 *Conveyancer and Property Lawyer* 176, 179-180.

⁷³⁸ Julia D Mahoney, 'Perpetual Restrictions on Land and the Problem of the Future' (2002) 88 *Virginia Law Review* 739, 765 and 767-8.

⁷³⁹ Law Commission (n 45) para 5.42; Reid and Nsoh (n 17) 189.

In light of the adaptability to uncertain change in the future, a fixed-term CA tends to be more desirable than a perpetual one. A perpetual CA created to maintain and enhance a wetland in one area might be useless if droughts take place and cause such a wetland to dry up. This weakness notes that a ‘dead-hand’ approach, which sets a permanent binding period, cannot help achieve effective adaptive management dealing with environmental changes.⁷⁴⁰ The limitation of perpetual CAs in this regard reflects that fixed-term CAs or those that can be modified or terminated are desirable.

Providing no legal provision specifying the binding period is another option employed in some jurisdictions. On the one side, it enables the parties to a CA to create an open-ended term of a CA, which is flexible depending on the intention of an intended holder and landowner. This means that the parties to a CA could set a CA which runs in perpetuity or for a limited time. This adaptive approach could increase the rate of participation in CA implementation. This approach may be appropriate with a CA law which seeks to initiate a broader scope of CA implementation, mainly where anyone can come into a CA with an eligible holder as seen from EPBCA 1999 of Australia. Nevertheless, CA parties might interpret that a CA having no binding period can be terminated at any time, which cannot guarantee the success of CA implementation.

Determining the appropriate duration for CAs is related to other considerations discussed above. For instance, CA durations are interrelated to the purposes for which CAs are created. Whilst setting aside the land for nature reserves requires the implementation with a perpetual or long-term CA, the encouragement of farmers to do or not to do some activities on their land, converting to new practices, might be achieved with a short-term agreement.⁷⁴¹ Above all, the strengths and weaknesses of the binding duration of CAs discussed above might be influenced by other provisions of a CA-enabling law. For instance, a perpetual CA might be more desirable if the law allows parties or a court the ability to modify or terminate it. This point will be subsequently discussed in part 11 below.

⁷⁴⁰ Owley (n 703) 122-23; Andrew Dana and Michael Ramsey, ‘Conservation Easements and the Common Law’ (1989) 8 *Stanford Environmental Law Journal* 2, 25.

⁷⁴¹ See the illustrations of how durations and purposes of implementation are interrelated in the context of Thailand in sub-section 1.2.3 of chapter 4 and section 2.7 of chapter 6.

8. Enforcement

The very nature of CAs as a voluntary agreement means that their successful implementation is reliant on the fulfilment of obligations by CA parties, and the breach of CA obligations could make their implementation fail. This part seeks to examine the existence of measure for the breach of CA obligations under the laws of the comparator jurisdictions. This thesis provides this investigation separately for various reasons. In the first place, the comparator jurisdictions provide various models for the sanctions for non-compliance, and they should be examined in more detail. Secondly, as mentioned above and suggested in sub-section 5.1.3 of chapter 3, the laws providing the enforcement measures in the event of non-compliance could make the legal implementation of a particular tool more or less effective,⁷⁴² specifically, where a burdened landholder breaches the terms of CA.⁷⁴³ Hence, this examination offers the room to consider what mechanisms can be available for enforcing a CA, apart from legal sanctions under the private law of contract.⁷⁴⁴ Third, the investigation of this legal matter will help justify the necessity of providing for this issue in the context of Thailand in the following chapter.

8.1 Australia

Australia demonstrates a jurisdiction where the legal measures for the enforcement of the violation of a CA duty are stated clearly. The range of enforcing measures includes civil, administrative and criminal sanctions subject to the conditions stipulated under each CA-enabling law. The rules governing the enforcement by civil law remedies are contained in the Commonwealth laws and the laws of NSW and WA. Administrative sanctions can be observed from the law of NSW. Criminal sanctions can be illustrated from the law of WA as summarised below.

As mentioned, all CA-enabling laws embrace the use of civil law remedies as a primary means for the enforcement. For instance, a burdened landholder who fails to comply

⁷⁴² Reid, *Nature Conservation Law* (n 35) para 1.6.18.

⁷⁴³ Reid and Nsoh (n 17) 197.

⁷⁴⁴ A further reason supporting the use of other measures, e.g. criminal sanctions, to enforce the breach of CA implementation is that, in some jurisdictions, a CA is seen as a legal tool to regulate the use of land, not a genuine private contract. Hence, further legal sanctions could be applied to make it achieve a certain conservation aim.

with CA obligations may be required to repay money paid by CA holders.⁷⁴⁵ However, the rules for the enforcement under the NSW regime are noteworthy here as an illustration of the regime providing comprehensive details on who is entitled to enforce CA obligations against burdened landholders, and what types of remedies can be awarded.

The law of NSW allows the Minister to enforce all types of private land conservation agreements by civil actions for an order to remedy or restrain a breach.⁷⁴⁶ In this case, the court may restrain the breach or award damages against landowners for a breach of the agreement.⁷⁴⁷ The enforcement by the Minister may take place whether the violation has occurred intentionally, recklessly or negligently. This includes the situation where a landowner has failed to prevent another person from causing the agreement violation.⁷⁴⁸

The rule for biodiversity stewardship agreements in NSW is also worth highlighting as it entitles *any person*⁷⁴⁹ to file a case in the court⁷⁵⁰ for an order to remedy or restrain a breach of a biodiversity stewardship agreement.⁷⁵¹ This provision can be regarded as enforcement by a third party. The court may make orders as it thinks fit to remedy or restrain the breach or direct the owner of the biodiversity stewardship site to retire biodiversity credits of a specified number and class (if applicable) within a period specified in the order.⁷⁵²

The availability of administrative sanctions can also be observed from the rule under the NSW regime. In the case where participating landowners break the obligations under a biodiversity stewardship agreement, such persons might be ordered by the Minister to comply with the obligations. Alternatively, the Minister can authorise another person to carry out such tasks and order the landowners to pay for the costs arising from such activities.⁷⁵³ Although this legal measure could be viewed as civil

⁷⁴⁵ EPBCA 1999, s 306(f); BCA 2016 (WA), s 115(h).

⁷⁴⁶ BCA 2016 (NSW), s 13.5(2).

⁷⁴⁷ *ibid* s 13.15.

⁷⁴⁸ *ibid* s 13.15(4)(a).

⁷⁴⁹ Under the NSW regime, a majority of environmental civil cases allows open standing, which means that any person is generally entitled to bring an environmental case to the courts by civil means under the conditions stipulated by particularly legislation (Bates (n 7) para 17.38).

⁷⁵⁰ The Court, in this regard, refers to the Land and Environment Court of NSW.

⁷⁵¹ BCA 2016 (NSW), s 13.15(1).

⁷⁵² *ibid* s 13.15(4).

⁷⁵³ *ibid* ss 11.25-11.26.

enforcement,⁷⁵⁴ it could also be seen as an administrative measure because the law entitles the Minister to impose a ‘biodiversity offsets enforcement order’ on a violating landowner, failure to comply with which is a criminal offence.⁷⁵⁵

As mentioned above, WA is representative of a jurisdiction employing criminal sanctions for the enforcement of CA obligations, which is unusual.⁷⁵⁶ The WA legislation establishes the rule that a person who breaches a biodiversity conservation covenant might be subject to a penalty with a fine of 50,000 Australian dollars.⁷⁵⁷ Another situation where this type of sanction can be applied is when burdened landholders under a biodiversity conservation agreement or biodiversity conservation covenant fail to notify holders when a change in ownership or occupation of the burdened property has been made.⁷⁵⁸

8.2 UK

Unlike Australia, CA-enabling laws in the UK do not have provisions providing explicit criminal and administrative sanctions for the breach of duty. However, the comprehensive rule for civil law remedies is in place and can be observed from the Environment Bill authorising the creation of conservation covenants.

Having examined the Environment Bill, this Bill provides the rule on what situations are regarded as the breach of obligations. The Bill provides that a negative obligation is breached where a burdened landholder does something which this type of obligation prohibits or where such a person permits another person to do such a thing.⁷⁵⁹ The Environment Bill also provides the subsequent steps for the enforcement of the breach of obligations. For instance, the Bill provides the rule for available remedies, which include specific performance, injunction and damages. Additional rules are also provided that the court must consider what remedies are appropriate for the breach of

⁷⁵⁴ It is a civil law remedy because the Minister, as a party to the agreement, exercises their right arising from the agreement to ask a bound landowner to perform an obligation.

⁷⁵⁵ BCA 2016 (NSW), ss 11.27 and 11.28.

⁷⁵⁶ Apart from the law of WA, the legislation in place in Tasmania, another state in Australia, also employs a criminal sanction for the breach of CA duty (see Nature Conservation Act 2002 (Tasmania), s 46).

⁷⁵⁷ BCA 2016 (WA), s 130(h).

⁷⁵⁸ *ibid* ss 119 and 131.

⁷⁵⁹ Environment Bill, cl 109.

duty, and the award of damages must be applied on the basis of contract law principles.⁷⁶⁰

In contrast to the regime of conservation covenants, that of management agreements merely entitles competent authorities (holders) to enforce the agreement but does not provide specific details on how it can be enforced. For example, many statutes provide that management agreements can be enforceable by the appropriate nature conservation body against persons who created a management agreement and successive landowners.⁷⁶¹ Some legislation provides specific measures comparable to a sanction for the breach of duty, but there is a further step that may be available. For instance, the breach of duties may trigger the compulsory purchase of the land subject to the agreement under the legal regimes creating SSSIs and nature reserves.⁷⁶² Similarly, the legal regime of conservation burdens in Scotland does not elaborate on the detailed provision of enforcement. TC(S)A 2003 merely provides that a conservation burden is enforceable by the holder of the burden irrespective of whether the holder has completed title to the burden.⁷⁶³

Regarding third-party enforcement, CA-enabling laws in the UK do not provide any rule in this matter. However, some legal rules are in place, allowing contracting parties to confer a right to enforce the contract to a third party where certain conditions have been met.⁷⁶⁴ This means that the absence of this rule from CA-enabling laws in the UK does not wholly settle the matter since a holder may authorise other qualified bodies to enforce a CA so long as it is not prohibited by the CA-enabling laws.

8.3 USA

The laws of the USA provide comprehensive rules for the enforcement of the breach of conservation easement obligations. Most state statutes lay down legal provisions on who can enforce a conservation easement and how a conservation easement can be enforced both by holders and courts. Both UCEA and state statutes deal with the first consideration by authorising bodies or persons who can bring action to the courts in a

⁷⁶⁰ *ibid* cl 110.

⁷⁶¹ CHSR 2017, reg 20 (4)(b); WCA 1981, s 39(3).

⁷⁶² NPACA 1949, s 18; CA 1968, s 15A.

⁷⁶³ TC(S)A 2003, s 40.

⁷⁶⁴ See Contracts (Rights of Third Parties) Act 1999, s 1(1)(a)(b) (for England, Wales and Northern Ireland) and Contract (Third Party Rights) (Scotland) Act 2017, ss 1 and 2.

very similar way. They generally provide that the bodies and persons entitled to do this task might be the owner of the subject property, the holder of the easement, a person having a third-party right of enforcement,⁷⁶⁵ and a person authorised by other law.

Some states may provide for this issue with slightly different rules. For instance, in Mississippi, the Attorney General of the State and the Department of Wildlife, Fisheries and Parks, are entitled to enforce conservation easements. A possessor of burdened property or one having any interest or rights in the burdened property has the same right in Pennsylvania. Some states grant this power to a governmental body when there is no holder or a third party who can enforce such a right, and some states confer the right to bring an action to a neighbour who owns or possesses property nearby the burdened property.⁷⁶⁶ The types of enforcement action against conservation easements can be either against any persons who violate or threaten to violate a conservation easement or against a holder.

Regarding the enforcement by the court, all states allow the bodies or persons mentioned above to bring a civil action to courts, and they are entitled to request various kinds of remedies, including injunctive relief and damages. Some allow the court to award damages for the loss of scenic, aesthetic, or environmental value as well as expenses arising from bringing an action to the court.⁷⁶⁷ Some allow pursuit of punitive damages.⁷⁶⁸ However, there is no state conservation easement law providing the use of criminal sanctions for the breach of duty.

8.4 An analysis

The findings from the laws of the three jurisdictions illustrate the use of different legal tools for the enforcement of the breach of CA obligation. Such a difference is worth

⁷⁶⁵ UCEA and most of the UCEA states lay down a similar rule for the creation of this type of right in that it can be created by spelling out in a conservation easement. CA parties may grant this right to persons who are qualified to be a holder, but are not a holder in such a conservation easement. The third-party right entitles its right holder to enforce the terms of the easement.

⁷⁶⁶ Illinois allows an owner of real property abutting or within 500 feet of the real property subject to a conservation easement to sue an owner of an encumbered property who wilfully violates a term of conservation easement; punitive damages can be awarded for this violation (Illinois, s 3(c)).

⁷⁶⁷ California, s 815.7(c); Hawaii, s 198-5; Colorado, s 38-30.5-108(3).

⁷⁶⁸ Illinois, s 4(c).

discussing to see the benefits and drawbacks of each legal model. The discussion can be conducted in three aspects as follows.⁷⁶⁹

8.4.1 Scope of the legal provision

The first distinction of the provisions of CA enforcement of each CA-enabling law can be seen from the scope of the legal provision. As observed above, some of the laws provide comprehensive detail for the enforcement by civil, administrative and criminal sanctions; many others provide a handful of provisions. This inconsistency begs the question which one is better. A short provision, as seen from management agreements and conservation burdens in the UK, prescribing that a CA can be enforceable by a holder, looks attractive when a drafter does not want to add any special features for enforcement of violation. This would enable a CA to be enforced under the general private law. This would be advantageous in that there will have no concern about the inconsistency between a new legal regime and the existing one. Yet a short provision could give rise to several problems of interpretation. This includes the ambiguity as to who, if anyone, will be eligible to enforce against a burdened landholder where a holder is reluctant to do this task. Additionally, this legal approach would make a CA close to a private legal tool which no-one other than the holder can participate in to investigate whether a CA in question will achieve the aim of conservation or not. Another drawback could be that it would close the door to use other types of legal enforcement, including administrative sanctions, to make it enforceable beyond mere private law remedies.

The comprehensive rules, on the other hand, come with both benefits and drawbacks. On the positive side, the availability of a range of enforcement options means that an enforcer has a choice in determining which is the most appropriate to deal with non-

⁷⁶⁹ It is important to note that the discussion about the enforcement of CAs can be examined in various respects depending on the purpose of discussion. This thesis does not explore how well the enforcement methods discussed here actually work in practice. First, answering that question would require further empirical study beyond the scope of this project. Second, the consideration of the effectiveness and cost of the enforcement of CA obligations does not entirely depend on CA-enabling laws, but rather is heavily reliant on the wider culture and practice of enforcement functions in each jurisdiction. Although litigation costs might be high in the USA, this might not be the case in Thailand, where filing to Thai administrative courts can remain free of charge, depending on the kind of case. Third, the literature examining the enforcement of agreements designed to further conservation tends not to focus sharply on specific forms of CAs but to consider a wider range of voluntary schemes, making direct comparison difficult (see Reid and Nsoh (n 17) 197-199; Holligan (n 72) 74-77; Law Commission (n 45) paras 6.78-6.80; Adena Rissman and Van Butsic, 'Land Trust Defense and Enforcement of Conserved Areas' (2011) 4 Conservation Letter 31, 34).

compliance in a certain situation. Nonetheless, some downsides of this approach should not be overlooked. For instance, this approach would make the governing regime of CA complicated as well as making a CA very similar to C&C regulatory tools. The use of administrative and criminal intervention could also detract from the very nature of CAs as private law instruments.

8.4.2 Eligible enforcers

Another distinctive issue in relation to who can enforce a CA in the comparator jurisdictions is about third-party enforcers. This feature is put in place in the USA but is not found in CA-enabling laws of Australia⁷⁷⁰ and the UK.⁷⁷¹ This begs the discussion about the benefits and drawbacks of providing a third-party enforcer.

Fundamentally, those who can enforce a private contract are the parties to the contract.⁷⁷² A third-party should not be eligible to do this task as a contractual obligation is generally created to serve the interest of the parties.⁷⁷³ Allowing a third-party enforcer could be problematic in that it increases the complexity to a CA-enabling law. There might be need to consider what to do if one party does not want to enforce against another, but the third-party wants to do so.⁷⁷⁴ For this reason, setting a provision for the enforcement by the parties alone might be more appropriate.

Nonetheless, there might be an exception for a CA because this type of agreement is a conservation tool seeking to serve the public interest rather than the mere mutual benefit of the parties. Vesting the entitlement to enforce a CA on the holder alone could be questioned in some aspect. For example, if a holder is reluctant to enforce against a burdened landholder, this could make a CA fail.⁷⁷⁵ Hence, some commentators suggest that setting a third-party enforcer, as employed in the USA, or allowing

⁷⁷⁰ Except for the NSW law observed in section 8.1 above.

⁷⁷¹ However, as mentioned in the last paragraph of section 8.2, parties to a contract may establish a third-party enforcer, but the statutes which authorise the creation of the third-party set some legal conditions regarding the persons eligible to do this task.

⁷⁷² Robert Merkin, Séverine Saintier and Jill Poole, *Poole's Textbook on Contract Law* (14th edn, OUP 2019) 442-3.

⁷⁷³ Unless expressly agreed by parties to the contract at the time of contract creation.

⁷⁷⁴ See an example of this kind of tension in *Tennessee Environmental Council, Inc v Bright Par 3 Associates, LP*, 2004 Tenn App LEXIS 155, 2004 WL 419720. One of the crucial points involves the interpretation of the words 'beneficiaries of the easement', who are entitled to enforce the breach of conservation easements under Tennessee's statute. The court held that '*any resident of Tennessee is a beneficiary of the easement, and thus has standing to enforce it*'. For this reason, the plaintiffs, which are an environmental organization, were entitled to enforce the easement.

⁷⁷⁵ See the discussion on whether and how the third-party enforcer should be designated in the context of the USA in Jessica E Jay, 'Third-party Enforcement of Conservation Easements' (2005) 29 *Vermont Law Review* 757, 764.

citizens to sue could make CA implementation transparent and encourage public participation.⁷⁷⁶ The detail on how a third-party right of enforcement can enforce a CA will be examined in part 12 regarding public oversight, as it relates to the point how a non-party oversees a CA after it is implemented.

8.4.3 Types of legal enforcement and remedies

The examination in the regulatory chapter summarised three available sanctions, namely civil, criminal and administrative sanctions.⁷⁷⁷ The UK and USA mainly use civil law remedies. Australia, on the contrary, employs a wide range of sanctions, including civil, administrative and criminal measures for enforcement. This engenders the question ‘should a civil law remedy be the only means for non-compliance enforcement of a CA?’ As a CA is based on the concept of private law of contract, civil enforcement is set as the primary method to enforce against a violator. Thus, it is undeniable to conclude that civil law remedies, such as injunction, and damages,⁷⁷⁸ should be available in line with the enforcement measures available in each jurisdiction. This notion is widely accepted as seen from the implementation of this idea in the comparing jurisdictions. Nevertheless, it might be necessary to consider what types of civil remedies should be offered for the enforcement of a CA. As seen from Australia and the USA, several civil remedies are in place. One of the advantages of having such measures in a CA-enabling law is that it enables the court to choose the most appropriate one to enforce against a liable person. Yet the downside of allowing the use of a wide range of remedies is that it could discourage a potential landowner from entering into a CA with a prospective holder.

Another point to be considered is whether a criminal offence and/or an administrative sanction should be used for the breach of a CA. This could be based on how a CA is viewed. A person who considers a CA as a private law agreement may argue that neither criminal nor administrative sanctions should be imposed against the person who does not comply with a CA obligation. This is because a criminal sanction runs

⁷⁷⁶ Owley (n 643) 14-15.

⁷⁷⁷ See sub-section 2.1.3 of chapter 2.

⁷⁷⁸ In the common law-based countries, injunction and damages are fundamental remedies available under the traditional laws of contract and torts. The first entails the use of a court order to require a violator (a defendant) to refrain from doing or to do certain actions that are the ground of the civil action in question. The latter is monetary compensation awarded to; (1) a party to the contract who is damaged by the breach of a contract or (2) a victim whose rights have been violated in a tort case (see Catherine Elliott and Frances Quinn, *Tort Law* (7th edn, Pearson Longman 2009) 392 and 412; Merkin, Saintier and Poole (n 305) 343 and 423).

counter to an underlying concept of a private law agreement.⁷⁷⁹ Indeed, civil law remedies could be sufficient because the court can award several enforcement measures, including injunctive relief, damages or any other types of compensation. The use of criminal sanctions could discourage prospective landowners from becoming involved as they might be aware of being liable. On the contrary, those who consider a CA as a regulatory tool may oppose the previous view because civil law remedies might be insufficient to serve a conservation goal. This is because the majority of civil law remedies require an enforcer to bring a case to the court, and this is time-consuming.⁷⁸⁰ The use of administrative enforcement, such as a biodiversity enforcement order, implemented in NSW, could be more appropriate because a holder could employ this type of sanction immediately.

Regarding a criminal sanction, although it might look inappropriate for enforcing a violation of a CA obligation, in reality, this is not too strong because it can be a mere monetary penalty.⁷⁸¹ In many cases, a criminal penalty is used as a last resort to secure compliance after a certain administrative measure has been used. The case of penalties for the breach of CA obligations under the law of WA, Australia exemplifies the use of a trivial criminal sanction which may not be different from civil penalties in place in the UK.⁷⁸² Hence, the categorisation as ‘civil’ or ‘criminal’ may be of limited practical significance.⁷⁸³ Some also maintain that imposing a criminal penalty for a violation in certain circumstances could help deter a person who intentionally seeks to violate an obligation.⁷⁸⁴

9. Incentives

The examination in chapter 2 revealed that the use of incentives to motivate or demotivate some activities is a matter of choice for social intervention.⁷⁸⁵ Although

⁷⁷⁹ Reid and Nsoh (n 17) 198.

⁷⁸⁰ Arguably, some may view that a prosecution may well be even more time-consuming.

⁷⁸¹ See an example on how civil law remedies can be designed to make it not to impose strong intrusion in the Regulatory Enforcement and Sanctions Act 2008, Pt 3 implemented in the UK.

⁷⁸² See the Regulatory Enforcement and Sanctions Act 2008, Pt 3.

⁷⁸³ As recommended by Macrory, the consideration whether and how regulators should sanction a particular activity should be based on his proposed Six Penalties Principles rather than to consider whether the sanction should be criminal or civil (see Macrory (n 181) Ch 2).

⁷⁸⁴ Ann Harris Smith, ‘Conservation Easement Violated: What Next -A Discussion of Remedies’ (2017) 20(3) *Fordham Environmental Law Review* 597, 631.

⁷⁸⁵ See sub-section 2.1.2.2 of chapter 2.

incentives look appealing in that they encourage or direct people to change behaviour through a price signal or property system, some disadvantages should not be overlooked, such as whether they represent an efficient use of public funding.⁷⁸⁶

This part further examines the benefits and drawbacks of the use of incentives for CA implementation. It considers whether CA-enabling laws of the comparator jurisdictions have any provision providing incentives for CA participants, what form they take, and whether they provide any conditions to be eligible for the incentives available. These examinations aim to set the scene for further discussions on whether incentives should be implemented to encourage landowners to enter CAs.⁷⁸⁷ Also, it will consider whether a clause on the use of incentives should be part of a CA-enabling law or not.

The justifications for the examination at this point are that, first, incentives could help motivate those entering into a CA. In many cases, a specific type of financial incentive, for instance, payment, is introduced to encourage entering into a CA.⁷⁸⁸ Thus, a CA-enabling law having provisions about the rewards or compensation for burdened landholders may look appealing compared to another offering no incentive.⁷⁸⁹ Second, the consideration of incentives is interrelated to other matters. These include linkage to the point about the need to conduct public monitoring being investigated in part 12.

9.1 Australia

CAs recognised at both the Commonwealth and the State levels provide specific kinds of financial or technical assistance to encourage entering into a CA. Under the Commonwealth legislation, financial, technical or other assistance can be made in exchange for entering a CA,⁷⁹⁰ but a participating person might be required to share the cost of implementation.⁷⁹¹ A CA created under EPBCA 1999 may offer the costs

⁷⁸⁶ Daniel Halperin, 'Incentives for Conservation Easements: The Charitable Deduction or a Better Way?' (2011) 74 *Law and Contemporary Problems* 29,41-3.

⁷⁸⁷ See further discussions in this point in section 2.10 of chapter 6.

⁷⁸⁸ Natalie Pratt, 'Analysing Conservation Covenants' (2014) 12 *Journal of Planning and Environment Law* 1310, 1315.

⁷⁸⁹ Tilmann Disselhoff, 'Alternative Ways to Support Private Land Conservation,' (Report to the European Commission, No E.3-PO/07.020300/2015/ENV 2015) 13.

⁷⁹⁰ EPBCA 1999, s 306(2)(e) provides that a CA may specify the conditions about money paid to the owner under the agreement.

⁷⁹¹ A possible reason behind this clause can be that in many cases, conservation agreements are made between the Commonwealth government and state governments to carry out conservation practices

of fencing to landholders so as to maintain some native vegetation to protect biodiversity values.⁷⁹²

The legal regimes of NSW and WA employ similar language in this matter. They provide that specified public bodies, who are holders, might be obliged to provide financial or technical assistance and goods or services.⁷⁹³ However, they do not provide any detail on how such assistance will be calculated or granted.

Apart from above provisions, landowners who enter into a CA are entitled to claim income and land tax deduction under the Income Tax Assessment Act 1997 (Commonwealth) and the Land Tax Management Act 1956 (NSW). This type of incentive is available for landholders signing a CA with state or local government authorities.⁷⁹⁴ Landowners eligible to claim a tax benefit must enter into a perpetual CA that meets the conditions for tax benefit claims.⁷⁹⁵

9.2 UK

In the UK, the provisions regarding incentives are found in the law authorising the creation of management agreements, but not in those authorising the creation of conservation burdens and conservation covenants, as can be further explained below. The provisions regarding the support of incentives for persons who enter into management agreements commonly articulate that management agreements can provide for the making of payments by either party to the other or any other person. Some of the authorising statutes provide a framework or guidance in awarding payment.⁷⁹⁶ The guidelines for awarding payments can be observed from the one created by virtue of WCA 1981.⁷⁹⁷ The latest version is the Guidelines on Management Agreement Payments and related matters created by Department of the Environment,

within a particular state. This could make it fair to require the two parties to share costs arising from CA implementation.

⁷⁹² EPBCA 1999, s 306(2)(f); Department of the Environment and Heritage, *An overview of the Environment Protection and Biodiversity Conservation Act 1999* (1999) 13.

⁷⁹³ BCA 2016 (NSW), ss 5.6(1), 5.22(2) and 5.29(2); BCA 2016 (WA), s 115(2).

⁷⁹⁴ Rosemary Lyster and others, *Environmental and Planning Law in New South Wales* (2nd edn, Federation Press 2009) 367; DECCW (n 82) 12.

⁷⁹⁵ Income Tax Assessment Act 1997 (Commonwealth), s 31.5(2).

⁷⁹⁶ WCA 1981, ss 39(2) and 50; CHSR 2017, regs 20(3) and 22; NERCA 2006, s 7(2).

⁷⁹⁷ The Guidelines apply to management agreements created under WCA 1981, SSSI agreement under CA 1968, and nature reserve agreement under NPCA 1949 by virtue of WCA 1981, s 50.

Transport and the Regions (DETR) in 2001,⁷⁹⁸ which replaced the previous version released in 1981.⁷⁹⁹ Rodgers notes that the 2001 Financial Guidelines changed the fundamental concept of management agreements under WCA 1981.⁸⁰⁰ In the past, financial payments could support buying out damaging land-use proposals. This approach was criticised on various grounds. For instance, Reid noted that this approach was ‘not only unduly expensive but also enabled unscrupulous landowners, by threatening to develop their land, to blackmail the authorities into paying out large sums, regardless of how speculative the proposed development might be’.⁸⁰¹ The (current) Guidelines have been changed by exclusively supporting positive conservation work in SSSIs,⁸⁰² and have a legally-binding effect by virtue of s 50 of WCA 1981.⁸⁰³

As mentioned above, the laws authorising the creation of conservation burdens and conservation covenants have no provision for awarding incentives for entering into a CA. Nonetheless, this does not preclude an authority seeking a burden in exchange for any payments. The Scottish Law Commission, which prepared a draft bill which later became TC(S)A 2003, took the view in regard to conservation burdens that this type of CA should not be an object of commerce and not be income-producing.⁸⁰⁴

9.3 USA

The USA provides several forms of financial incentives to encourage entering into a conservation easement. Predominantly, a tax benefit has been used for such a purpose since 1976.⁸⁰⁵ This type of benefit plays a major role in inducing landowners to donate a conservation easement.⁸⁰⁶ Other kinds of financial rewards are also in place,

⁷⁹⁸ DETR, ‘Guidelines on Management Agreement Payments and Other Related Matters’ (Revised Guidance under s 28M and s 50 of the Wildlife and Countryside Act 1981, DETR 2001).

⁷⁹⁹ Rodgers, *Law of Nature Conservation* (n 493) 116-17.

⁸⁰⁰ *ibid* 117.

⁸⁰¹ Reid, *Nature Conservation Law* (n 35) para 5.1.8; See also Ian Hodge, *The Governance of the Countryside: Property, Planning and Policy* (COP 2016) 186-87; Rodgers, *Law of Nature Conservation* (n 493) 118; Marion Shoard, ‘The Wildlife and Countryside Act and the Development of a Conservation Protection Racket’ in Marion Shoard (ed), *This Land is Our Land: Struggle for Britain’s Countryside* (Gaia 1997) 364.

⁸⁰² Rodgers, *Law of Nature Conservation* (n 493) 117.

⁸⁰³ Rodgers, *Agricultural Law* (n 490) para 13.138.

⁸⁰⁴ Scottish Law Commission (n 509) para 9.20.

⁸⁰⁵ Nancy A McLaughlin, ‘Internal Revenue Code s 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards’ (2010) 45 *Real Property, Trust & Estate Law Journal* 473, 476.

⁸⁰⁶ Bray (n 523) 121; Halperin (n 786) 35.

including direct government funding. An economic incentive provision rarely appears in state statutes but can be found in the laws authorising the use of incentives or subsidies for conservation or agricultural purposes as summarised below.

The UCEA and the majority of state statutes, in both UCEA and non-UCEA states, have no provision providing specific detail about the types of incentive to be used. This kind of provision is occasionally found in the statutes of some states. For instance, Maryland allows landowners to claim a state income tax credit when they conclude conservation easements which meet certain conditions. For instance, an eligible conservation easement must be held by specified conservation bodies with a perpetual term. Additionally, the statutes of Maryland and Mississippi set the detailed provisions on how such a tax benefit is calculated.⁸⁰⁷ Texas makes an explicit provision on this legal element by articulating that the acquisition of a conservation easement can be supported with finance subject to the conditions under the specified statutes.⁸⁰⁸

As mentioned earlier, many states have no provisions awarding incentives. However, landowners who donate a conservation easement may claim a benefit where they meet the conditions in the statutes authorising public funding or tax interests. This includes the support of the federal government under specific laws or schemes or through funding by states.⁸⁰⁹ Despite being beyond the scope of applicable laws being examined, it is worth mentioning the sources of the incentives a landowner could ask for. This can be exemplified from the rules under the Internal Revenue Code (IRC) and the Farm Bill.

The rules for a tax incentive available for persons who donated conservation easements can be found both in IRC and state statutes. S 170 (h) of IRC provides the rules substantially influencing the conditions of creating the conservation easement regime of many states. It enables a landowner who donated a conservation easement to claim a tax deduction equal to the value of the easement.⁸¹⁰ As observed in section 7.3 above, a qualified conservation easement must bind in perpetuity, and be entered into with qualified entities (holders) for stipulated conservation purposes.⁸¹¹

⁸⁰⁷ Maryland, s 10-723(b); Mississippi, s 89-19-11.

⁸⁰⁸ Texas, s 183-006.

⁸⁰⁹ Cheever and McLaughlin (n 49) 175.

⁸¹⁰ In brief, the value of a conservation easement can be calculated by comparing a fair market value of donated land at the time before and after a conservation easement donation subject to the rule under the Treasury Regulation, s 1.170A-14(h)(3)(i).

⁸¹¹ See the requirements regarding the qualification of an eligible holder to claim a tax incentive under s 170(h) in section 3.3 of part 3 above.

Regarding funding from the federal government, the Farm Bill represents the legislation offering financial incentives for the purchase of an agricultural land easement by eligible entities in eligible land. The funding can also be spent as technical assistance to implement this programme.⁸¹² Additionally, many states have introduced state and local level funding programmes to encourage a donation of conservation easements and many of them established agricultural conservation easement purchase programs for the fulfilment of this task.⁸¹³

9.4 An analysis

The observation in the above sections illustrates various distinctions regarding incentives, and such distinctions can be drawn on in discussing the following points.

9.4.1 Benefits and drawbacks of making use of incentives

As explained at the beginning of this part, incentives could induce prospective landowners to enter a CA. Financial benefits paid to landowners could cover the cost of the operations required to fulfil a CA obligation. Payments, offering rewards in exchange for the loss of the opportunity in making a profit, help compensate for income foregone.⁸¹⁴ This means that establishing a CA framework without introducing any incentives could be less attractive from a landowner's perspective.⁸¹⁵ Additionally, some scholars view that a CA with no consideration seems to create less legitimacy for public oversight.⁸¹⁶ From a regulatory perspective, creating a legal commitment from a private law instrument with no reciprocal incentive, should not come with high expectation of compliance, enforcement and monitoring by a holder.

However, some consider that the use of incentives might be problematic. First, incentives are commonly taken from public funds. They include public payments and the reduction of the tax expected to be collected from a landowner, as a taxpayer. The use of incentives from these sources means that governments could lose revenue that

⁸¹² See Food Security Act 1986, s 1265C, amended by Farm Bill 2018.

⁸¹³ Cheever and McLaughlin (n 49) 179.

⁸¹⁴ However, as observed from the case of the UK above, there is need to consider which conservation practices should be supported by incentives to avoid the trap of buying out the right to cause harm to the land without doing any positive actions.

⁸¹⁵ Pratt (n 314) 1315; Reid, 'The Privatisation of Biodiversity?' (n 493) 214.

⁸¹⁶ See the opinions of consultees supporting this view in Law Commission (n 45) para 4.94; Owley (n 643) 11.

they could spend on other conservation programmes.⁸¹⁷ Second, some may take the view that public money should not be spent to support the protection of privately-owned land where it is difficult to measure the success.⁸¹⁸ Paying landowners who entered into management agreements in the UK in the past to stop them changing the type of land use and then receiving grant aid from taxpayers was criticised as unduly expensive.⁸¹⁹ Third, some people argue that incentives may distort the motivation for conservation of a landowner from a willingness to conserve valuable features on land, incorporating an altruistic view, to a desire for taking money from participation in a CA. The use of financial incentives is an example of a negative side of this aspect.⁸²⁰ In the case of conservation burdens, the Scottish Law Commission noted that they do not want a landowner to view a CA as an instrument to make a profit from land.⁸²¹ This indicates that the Commission wanted to encourage people to conserve their land with a real conservation mindset rather than to enter a CA with a commercially-based reason. Some note that if landowners participate in a CA scheme for a short-term incentive rather than the aspiration to conserve the land, this could be problematic where the prices of agricultural products increase significantly; they might abandon the CA and to comply with its obligations in pursuit of greater income.⁸²²

9.4.2 The necessity of including a provision granting incentives

The discussion in this sub-section can be divided into two points starting with the discussion about the benefits and drawbacks of incorporating a provision granting incentive in a CA-enabling law. Then, the upsides and downsides of providing a detailed provision for this legal matter will be discussed.

As seen from the laws implemented in three jurisdictions above, some CA-enabling laws have this type of provision, but many do not. This difference engenders the question of what the advantages and disadvantages of two such different approaches are.

⁸¹⁷ Owley (n 643) 12.

⁸¹⁸ Christopher Rodgers, 'Nature's Place? Property Rights, Property Rules and Environmental Stewardship' (2009) 68(3) Cambridge Law Journal 550, 561-2, Rodgers, *Law of Nature Conservation* (n 493) 118.

⁸¹⁹ Reid, *Nature Conservation Law* (n 35) para 5.1.8; Hodge (n 801) 186-87; Rodgers, *Law of Nature Conservation* (n 493) 118.

⁸²⁰ Halperin (n 786) 41-3.

⁸²¹ Scottish Law Commission (n 509) para 9.20.

⁸²² Sue Stolton, Kent H Redford and Nigel Dudley, *The Futures of Privately Protected Areas* (Protected Area Technical Report Series No 1, IUCN 2014) 35.

On the positive side, providing an incentive provision in a CA-enabling law could guarantee that burdened landholders will be eligible to get some form of incentives which could help them fulfil obligations arising from a CA. Without this clause, it remains uncertain whether or not a holder or government is obliged to provide some assistance in return. Apart from that, this approach makes a CA-enabling law attractive and can be seen as an economic instrument for environmental protection. However, others might oppose the previous notion on grounds that there is no need to incorporate this type of condition in a CA-enabling law but rather it should appear in other laws, which are the sources of incentives. This is supported by the US model, where the majority of CA-enabling laws are silent on incentives in their state statutes. This view looks attractive in that a CA-enabling law should exclusively set the most critical elements for creation, compliance and enforcement of land-based obligations, and the matter about incentives might not be an important one. This approach enables the laws authorising the sources of funding to elaborate specific conditions for eligible persons and type of CA that are compatible with the requirements of granting incentives under those laws.

Another discussion is about the benefits and drawbacks of providing a detailed provision about incentives. This question is set to enable further discussion in the case where a law-maker seeks to incorporate an incentive provision in a CA-enabling law. This consideration emerges from the fact that many CA-enabling laws contain provisions on incentives.

The incorporation of a detailed provision about incentives in CA-enabling laws looks desirable because they not only guarantee a chance of receiving some form of incentive but also provide how a specific type of incentive can be granted and to whom. This feature can induce a prospective landowner who seeks financial support to opt into a CA. Nonetheless, it may generate some difficulty as it means that a qualified holder might need to offer a specified incentive to a landowner where such a qualified holder wants to enter into a CA, and this may not be appropriate for the needs of a specific landowner. For instance, if the CA-enabling law prescribes that a CA participator may receive an income tax deduction, this may not be attractive from the view of a landowner who has to pay a low rate of an income tax.

Such a limitation could suggest that the use of a provision with no detail regarding the incentive award may look desirable because a CA may be more flexible in determining

which specific types of incentive are appropriate for an individual CA subject to the agreement between parties to a CA. This approach sees the place for detailed provisions being in the law aiming at granting financial support, as seen from the case of the Farm Bill in place in the USA. Participating landowners are eligible to receive payments from governments when the CAs they entered into meet the conditions specified by laws granting such a payment. The disadvantages of this brief provision are that they are less clear on what type of incentives can be made, and from where the sources of incentive come. In this regard, a detailed provision, elaborating what specific forms of incentive are available, and how they are granted could look more attractive. However, this approach should be exclusively employed where a government decides to support the use of CAs with specific types of incentive and ensure that such support will be available throughout the binding period of a CA. This discussion will be examined in-depth in the next chapter in the context of Thailand.

10. Registration and the system of making CA information available

This part primarily investigates how the comparator jurisdictions set the provisions recognising CA registration. It is interlinked to the very nature of CAs in imposing obligations running with the land, as observed in the previous parts.⁸²³

As will be observed in the later sections, the rule of CA registration is part of land registration under the legal regime of each jurisdiction. In brief, a fundamental rule for the acquisition or transfer of property rights on real property is reliant on a requirement for the registration of burdens on a land title deed.⁸²⁴ This rule requires landowners to

⁸²³ The examination in the previous parts indicates that the ability of CAs to run with the land and bind future landowners plays a vital part in shaping the legal features about burdened landholder, types of obligations and binding durations (see parts 5 and 7, and sub-section 6.4.3 above).

⁸²⁴ See a range of land registration systems in European countries at Christoph U Schmid, Christian Hertel and Hartmut Wicke, *Real Property Law and Procedure in the European Union: General Report* (European University Institute, EUI-Real Property Law 2005) 38-42.

register or record the acquisition or creation of any obligations running with the land to make them legally binding.⁸²⁵ This process could be done in a land title document.⁸²⁶

Several reasons can justify making use of land registration. First, it is a pre-condition of making rights arising from a CA fully implemented and enforced. At the same time, where a CA is varied or terminated, making some change in land registration also brings the change into effect. In many cases, as will be seen from the investigation below, this process is employed to give a CA legally binding effect. Second, land registration is evidence of the existence of a CA, displayed on a title document of property. Land registration could help a person who seeks to purchase the land subject to a CA to be on notice.⁸²⁷ At the same time, it plays a vital role in keeping a record where a CA is varied or terminated.

Another point worth examining as part of the investigation at this point is about the system of making CA-related information available for the public, although it is not part of the requirement of CA registration and established with a different purpose.⁸²⁸ The rules, nevertheless, involve the recordation of CA information. This system may require a governmental body to set a system to gather information about CAs made and make it available to the public. This information could help local planners to be aware that which piece of land is under a CA and avoid declaring such a land to be restricted by another legal restriction.⁸²⁹ It also could help secure the openness and transparency about the existence of a CA.⁸³⁰

⁸²⁵ The details in making the registration of the land in each jurisdiction might be varied but follow this basic pattern. In the context of England, see Land Registration Act 2002, ss 2 and 48. See also Law Commission (n 534) paras 2.55-2.58.

In Australia, see the rule for NSW in the Real Property Act 1900, s 46A (creation of easements over own land by a dealing).

In the USA, the rules might be slightly different from the UK and Australia subject to the land law of each state. For instance, the rules of land registration in California are stated in the Civil Code about the recording transfers, ss 1213 – 1220.

⁸²⁶ In England, for example, see the explanation about the registration of easements or covenants in England in Law Commission (n 534) 2.50-2.64; Land Registration Act 2002, ss 2 and 48; Judith Bray, *Unlocking Land Law* (6th edn, Routledge 2019) 57-81.

⁸²⁷ Law Commission (n 45) para 5.62; Amy Wilson Morris and Adena R Rissman, 'Public Access to Information on Private Land Conservation: Tracking Conservation Easements' [2009] *Wisconsin Law Review* 1237, 1242.

⁸²⁸ While the main purpose of CA registration is for dealing with the land in future, the system of making CA information available is primarily for transparency in serving the public goals involved.

⁸²⁹ Gerald Korngold, 'Private Conservation Easements: Balancing Private Initiative and the Public Interest' in *Property Rights and Land Policy*, Proceedings of the 2008 Land Policy Conference (Lincoln Institute of Land and Policy 2009) 369.

⁸³⁰ Law Commission (n 45) para 5.62 and Law Commission (n 84) para 5.28.

10.1 Australia

Overall, Australia provides some conditions for making the information about CA implementation available for the public, but the means of CA registration or recordation are slightly distinctive. Commonwealth legislation does not require a competent body to register or record a conservation agreement, but the laws of NSW and WA employ such legal techniques as a key mechanism.

The requirements of CA registration under the laws of NSW and WA are similar in that they require registration of the creation of CAs on land title documents, but the governing rules remain distinctive subject to the general rules under land law of each state. In general, the regimes of two states require a holder to notify the Registrar-General. Then, the laws require the Registrar-General to register a particular CA.⁸³¹ The legal effect of registering a CA is that it enables a CA to run with the land and to be enforced by and against a successive owner of land title.⁸³² The failure to register could leave a CA unenforceable against anyone other than the original party who entered it. It is to be noted that registration is also required when a holder and burdened landholders seek to vary or terminate a CA. The details for this will be examined in part 12 below.

As mentioned, the legal technique employed in the Commonwealth level under EPBCA 1999 is unique. Although registration is not a requirement under the Commonwealth regime, the Minister, as a holder, is required to publicise a conservation agreement in the Gazette or other way stipulated in regulations.⁸³³ This can be seen as a system of central recordation of CAs similar to those used in the USA as will be seen in section 10.3 below. The reasons for this could be that as noted in 3.1, eligible areas for concluding a CA can be either terrestrial areas or maritime ones, where there will be no title document. In many cases, a conservation agreement is merely an agreement to manage publicly-owned land by states or local authority, which might not be owned by such bodies. Making a formal public declaration seems to be more desirable than providing a legal requirement to register the creation of CAs in a land title deed.

⁸³¹ BCA 2016 (NSW), ss 5.12 (1), 5.24 and 5.31; BCA 2016 (WA), s 127.

⁸³² BCA 2016 (NSW), ss 5.13(1), 5.24 and 5.31; BCA 2016 (WA), ss 118 and 129.

⁸³³ EPBCA 1999, s 309(1).

10.2 UK

Similar to the legal regime in Australia, the coming into effect of CAs in the UK requires a certain method of registration but the legal procedures employed in each region are slightly different subject to the land law background and the legal provisions requiring such registration. However, there is no comprehensive system collecting information about CAs.

The legal regimes in the registration of management agreements under various statutes use the same basic notion. However, they provide separate provisions about the methods of land registration between management agreements in England and Wales and in Scotland. Regarding those implemented in England and Wales, several statutes, for instance, WCA 1981,⁸³⁴ provide that the registration of management is required similarly as that of forestry dedication covenants.⁸³⁵ In England, an SSSI agreement is registered as a local land charge.⁸³⁶ In Scotland, an SSSI agreement can be recorded in the official land registration system (the Register of Sasines and now the Land Register).⁸³⁷ After being registered or recorded, management agreements can be enforced against persons who have an interest in the land and those who will be in this position in the future.⁸³⁸ Similarly, the Environment Bill provides that a conservation covenant is a local land charge,⁸³⁹ which means that it requires registration to make it enforceable against successive landowners and occupiers.⁸⁴⁰

TC(S)A 2003, which enables the creation of a conservation burden, is another Scottish statute requiring the registration of real burdens. Conservation burdens can be created by duly registering a constitutive deed.⁸⁴¹ The registration of burdens under this Act is

⁸³⁴ WCA 1981, s 39(4).

⁸³⁵ The governing rule for the registration of forestry dedication covenants can be observed from s 5(4) and Schedule 2 of Forestry Act 1967, s 72 of Settled Land Act 1925. These provisions are designed to deal with the special case where land is held by someone who is not the absolute owner who enters the agreement. It is implicit in s 5 of Forestry Act 1967 that it is the owner of land who is entering the agreement (only the full owner will have the capacity to make/accept the promises involved). The other provisions then set out the rules for those who have less than full ownership, allowing them to enter agreements that apply as far as their own limited interests do. This special provision is not something that needs to be mentioned.

⁸³⁶ DETR (n 798) para 3.11 and 4.2.

⁸³⁷ CA 1968, s 15(6).

⁸³⁸ *ibid* s 15(6).

⁸³⁹ Environment Bill, cl 105.

⁸⁴⁰ *ibid* cl 107(2)(5).

⁸⁴¹ TC(S)A 2003, s 4(1).

unique in that it sets an effective date of a conservation burden after it is registered, and such a constitutive deed may postpone an effective date of a conservation burden to the date specified in that deed subject to conditions under this Act.⁸⁴² As conservation burdens are a subset of real burdens, they run with the land after the registration has been made.⁸⁴³ TC(S)A 2003 stipulates that the registration of this burden in a constitutive deed⁸⁴⁴ makes the burden run with the land and binds an owner, tenant or persons having the use of the burdened property.⁸⁴⁵

10.3 USA

As conservation easements constitute an interest in real property, most of the conservation easement-enabling statutes and UCEA employ a similar language regarding a land registration requirement. They commonly state that conservation easements can be recorded in the same manner as other easements.⁸⁴⁶

The details on how conservation easements can be recorded are different subject to the legal rule of recordation in each state. California and Hawaii require the recordation in the office of the county recorder, and the bureau of conveyance.⁸⁴⁷ Colorado requires the recordation upon the public record subject to the laws regarding recordation.⁸⁴⁸ Some states require further detail about the recordation. For example, Illinois, New York and Montana use very similar language that the recordation must describe details about the land with a sufficient legal description or by reference to a recorded plot showing its boundaries.⁸⁴⁹

Regarding the legal binding effect of conservation easement recordation, many UCEA state statutes employ the same or similar provisions which they adopted from UCEA. They require the acceptance of conservation easements by a holder and the recordation

⁸⁴² *ibid* s 4(1).

⁸⁴³ Scottish Law Commission (n 509) para 1.4; Guthrie (n 508) 186.

⁸⁴⁴ The term ‘constitutive deed’ used in the context of Scottish land law refer to a deed used to create or record real burdens, including conservation burdens (see Scottish Law Commission (n 509) para 1.37).

⁸⁴⁵ TC(S)A 2003, ss 9 and 10.

⁸⁴⁶ The terms ‘record’ and ‘recordation’ are widely used in the USA in similar meaning as ‘register’ or ‘registration’ used in the UK and Australia.

⁸⁴⁷ California, s 815.5; Hawaii, s 198-5.

⁸⁴⁸ Colorado, s 38-30.5-107.

⁸⁴⁹ Illinois, s 5; New York, s 9-0305.4; Montana, s 76-6-207.

of conservation easements as the pre-conditions making the rights arising from conservation easements enforceable in favour of or against a holder.⁸⁵⁰

The legally binding effect of conservation easement recordation under the laws of non-UCEA states are slightly different from those adopting the rule of UCEA. They provide a fragmented picture, but the legal consequence is similar to those of the UCEA states. Michigan, for example, provides that conservation easement must be recorded ‘with the register of deeds in the county... to be effective against a bona fide purchaser for value without actual notice’.⁸⁵¹

Regarding the system in compiling conservation easement-related information, the USA has a central database compiling information about conservation easements nationwide, namely the National Conservation Easement Database (NCED).⁸⁵² This database is not an outcome of a statutory requirement but rather the effort of several public and non-public bodies in the country, who help collect necessary information about each easement, for instance, its location and extent. This system becomes a tool helping governmental bodies and land trusts to plan a strategy of land conservation, enhance collaboration and advance public accountability regarding conservation easements held by those bodies. It is worth noting that the National Conservation Easement Database is not a complete record of all conservation easements and data availability in the US has been criticised.⁸⁵³

Apart from the central system explained above, a few states set a legal requirement considered as a central recordation system of each state. Maine, for instance, requires all easement holders to file an annual report to the Department of Agriculture, Conservation and Forestry. The report must indicate the number of easements held, their location, and the amount of acreage protected.⁸⁵⁴ Utah uses a different approach in that it obligates a burdened landowner, not a holder, to submit a copy of a conservation easement signed and binding their properties to the Utah County Assessor’s office.⁸⁵⁵

⁸⁵⁰ For example, see UCEA, s 2(b), South Carolina, s 27-8030(B) and Texas, s 183.002(b).

⁸⁵¹ Michigan, s 324.2141.

⁸⁵² See NCED, ‘National Conservation Easement Database: About Us’ <www.conservationeasement.us/about/> accessed 14 May 2020.

⁸⁵³ James L Olmsted, ‘The Invisible Forest: Databases and the End of the Clandestine Conservation of Natural Lands’ (2011) 74 Law and Contemporary Problems 51, 74-81.

⁸⁵⁴ Maine, s 479-C.

⁸⁵⁵ Utah, s 57-18-4.

10.4 An analysis

The investigation about CA registration above shows that all CA-enabling laws provide the means for providing evidence for the coming into effect of CAs. Registration is prevalent in the majority of CA-enabling laws, but the means, procedures and legal effect of the recordation are slightly different. Some provide the details on how to register CAs while many do not. The variety of details concerning the means of making a CA be in effect constitutes various points for discussion, including the limitation, legal effect and the system of recordation as will be observed below.

10.4.1 Necessity of land registration

Although most CA-enabling laws require the registration of a CA in a land-related document subject to the broader national schemes for land titles, this does not mean that land registration has no drawbacks or limitations. This sub-section considers the reasons for and against the use of CA registration.

As mentioned at the beginning of this part, the most crucial reason, requiring the CA registration, stems from a traditional concept of land law in many jurisdictions. Without the registration of the creation of CAs in a land title deed, an obligation or right created between two parties is a mere personal right or contractual obligation. Land registration would help standardise a CA in the same position of other types of interests in the land and enables a person seeking to purchase a piece of land to notice title conditions recorded in a land title.

Nonetheless, it is worth considering what the limitations of land registration might be. First, recordation might be problematic where a proposed CA-enabling law seeks to conserve some features that do not appear on the land which have a land title document, for example, to oblige an agreed person to improve water quality in a river, to require a particular public body to conserve some publicly-owned land, as the case may be. This could arise where a CA is created as a vehicle for creating payments for ecosystem services between e.g. persons living in an upper stream and the government. CA registration on a land title might not be appropriate if CA-enabling laws aim at conserving features in the areas other than the privately-owned land. Land registration may look unwelcome as it makes a CA similar to the regulation by the law, and this

seems bureaucratic from the viewpoint of a landowner. It also indicates that any modification and termination may need to be done in the same vein as that of creation.

10.4.2 Legal effect of land registration

As observed above, many CA-enabling laws require the registration of a CA with different conditions, and this constitutes different legal effects. Some CA-enabling laws view land registration as a condition of the validity of a CA. Without land registration, no right arising from a CA can be claimed against an opposite party. However, many others see it as a condition of making a CA run with the land. Although unregistered CAs do not run with the land, they are legally binding and generate contractual obligations on the parties who made them.

The first model considers that an unregistered CA constitutes no rights and claims to a holder and burdened landholder. This view looks appealing because, first, it forces a holder or landowners to record a CA as soon as practicable. A holder will be unable to claim any rights against a burdened landholder unless the recordation has been completed. Second, this approach increases the likelihood of land being secured by a CA. Once a CA has been registered, a prospective purchaser, who seeks to develop the land under a CA, has notice that such land is restricted for development by a CA.

Nevertheless, some negative sides could occur from this approach. In the first place, setting land registration as a pre-condition of making a CA legally binding denies the trial period for implementation of CAs. It could be possible that where one of the parties has started carrying out some tasks with a cost, such a party will be unable to claim any rights from a CA unless such a CA is officially registered.

The latter approach considers an unregistered CA as a personal right which creates a contractual obligation. This view enables CA parties to claim the right arising from a CA against each other. A holder can ask a burdened landholder to carry out the tasks agreed as the obligations, which means that the specified objects will be immediately conserved. It also looks desirable in that, from a regulatory point of view, a holder can require a burdened landholder to complete their tasks. Where such a burdened landholder no longer owns the burdened land, such an unregistered agreement will become unenforceable or terminated. This can be seen as an alternative way to create an initial agreement and allows the parties to decide whether they want to make the agreement run with the land and bind a future landowner or not. However, the

downside could be that an unregistered agreement may prevent a burdened landholder from claiming some benefits, such as tax breaks, which rely on there being an adjustment of property rights, not just a personal contract. This may motivate such a person to abandon a CA. This means that the fulfilment of a conservation purpose will be insecure, mainly, where the burdened land changes owner. This is a crucial point, especially in view of the discussion earlier about how a real virtue of CAs is that they create a long-term obligation.

10.4.3 Necessity of a system to make information available

The last point is about the advantages and disadvantages of setting a system for compiling CA information as seen in many states in the USA. As mentioned at the beginning of this part, this objective of the introduction of this system is to bring transparency and accountability of actions and spending for the public good, not informing those people who are directly affected from CA implementation. The establishment of this system is appealing in various respects, including, first, this system is a mechanism for gathering information about CAs, and to ensure the consistency between CA obligations and land-use planning of governments.⁸⁵⁶ Second, providing this system would help governments assess the success of CA implementation.⁸⁵⁷ Third, it guarantees transparency and accountability to the wider public where the public can access the information provided by this system.⁸⁵⁸

Nonetheless, publicity of a CA through the compilation system could generate some threats to the features conserved under a CA. It could become the map showing where some valuable features can be found, and some people may enter into the property and take such features.⁸⁵⁹ In the USA and Australia, the opponents of registering a parcel of land subject to a CA are concerned about their privacy on land, and the need to protect fragile species and habitats from unwelcome visitors.⁸⁶⁰ At the same time, it might be questionable what type of information should be compiled and made available for the public.⁸⁶¹ Others add that the information made available for the

⁸⁵⁶ See the opinion of Professor Nancy McLaughlin in Law Commission (n 45) para 5.72.

⁸⁵⁷ See the opinion of Professor Colin Reid in *ibid* para 5.73.

⁸⁵⁸ See the opinion of Natural England in *ibid* para 5.74.

⁸⁵⁹ Law Commission (n 84) para 5.28.

⁸⁶⁰ Olmsted (n 853) 55; James Fitzsimons and Ben Carr, 'Private Protected Areas in Australia: Current Status and Future Directions' (2014) 10 *Nature Conservation* 1, 11.

⁸⁶¹ This consideration is interrelated to the point on whether and to what extent public oversight should be provided by making environmental information available to the public, which will be examined in sub-section 12.4.2 below.

public should not be limited to that available in a registration process but should include that deriving from monitoring and enforcement stages. The Law Commission mainly discussed whether a central recording database should be introduced, in what form and how it will be made available, and who will take responsibility and bear the cost of making the information available.⁸⁶²

11. Variation and termination

The consideration of whether and how CAs can be varied or terminated is a further element worth examining. The ability of agreements to run with the land, especially those running in perpetuity to secure long-term conservation, means that they could experience some unanticipated events and it is challenging to predict whether their implementation will continue to serve their purposes and what may arise in the future.⁸⁶³ The word ‘variation’ refers to the action of changing or revising a term in a particular agreement after being entered into. A variation could make a change in the obligation of a burdened landholder, the scope of the purposes of the implementation of a CA or the binding period. The word ‘variation’ will be used interchangeably with the terms ‘modification’ and ‘amendment’. The word ‘termination,’ on the other hand, refers to the action seeking to cease the application of a CA before the date or period indicated in a CA. In many cases, a perpetual CA can be terminated according to the conditions specified under a CA-enabling law if it can no longer be used to serve the purpose for which it was initially created. The words ‘cancellation’ and ‘discharge’ will be occasionally used in place of the term ‘termination.’

Although the variation and termination of a CA constitute different legal effects, this thesis will examine these considerations together. This is because most of the CA-enabling laws generally deal with these two matters with the same or similar rules, and they share the same points for discussion. This part will mainly examine three points, comprising: the actors entitled to vary or terminate a CA; the circumstance where a CA can be varied or terminated; and the process of variation and termination.

⁸⁶² Law Commission (n 45) paras 5.71-5.87.

⁸⁶³ The Land Trust Alliance notes that several unanticipated changes could happen and require CA parties to consider whether a CA should be amended or terminated. They include acts of God, business cycles and economic demand or new understanding in conservation science and agriculture (Sylvia Bates and Mary Burke, *Amending Conservation Easements: Evolving Practices and Legal Principles* (2nd edn, Land Trust Alliance 2017) 3-5).

11.1 Australia

Overall, CA-enabling laws at both Commonwealth and state levels share a similar approach regarding the variation and termination. First, they allow the parties to the agreement to vary or terminate a CA. Second, the court has no role in deciding whether a CA should be varied or terminated. Third, the majority of the laws allow a holder to terminate a CA unilaterally where such termination meets certain conditions. However, the rules dealing with such variation and termination are slightly different, as will be illustrated as follows.

The legal approaches for modifying or terminating CAs under the Commonwealth legislation and law of NSW are similar. They can be modified or terminated by a subsequent agreement between the parties. Such an agreement can be made between the public bodies who are a holder and a burdened landholder according to the rules under specific provisions.⁸⁶⁴ The unilateral variation by a holder, on the other hand, can be made where it meets the conditions stipulated by the law,⁸⁶⁵ including when a CA is no longer able to achieve its purposes,⁸⁶⁶ or when a mining or petroleum licence will be granted on the land subject to a CA.⁸⁶⁷

The legal approach used for the modification and termination of CAs in WA is slightly different from those examined above. BCA 2016 (WA) requires that an amendment of a biodiversity conservation agreement and biodiversity conservation covenant can be done with the consent of the parties,⁸⁶⁸ which means that unilateral modification or amendment cannot be made. The termination of such two types of CAs is distinctive in that the covenant can be cancelled by a mutual agreement or by unilateral written notice by a holder.⁸⁶⁹ The agreement, on the contrary, can be exclusively terminated by a holder without the consent of a burdened landholder where the agreement can no longer serve its purpose for which it is entered into.⁸⁷⁰

⁸⁶⁴ EPBCA 1999, s 308(1) and (3); BCA 2016 (NSW), ss 5.10(2)(a), 5.23(2)(3) and 5.30(2).

⁸⁶⁵ EPBCA 1999, s 308(4) and (5); BCA 2016 (NSW), ss 5.10(2)(b), 5.23(4)(7) and 5.30(4).

⁸⁶⁶ EPBCA 1999, s 308(4); BCA 2016 (NSW), s 5.23(4).

⁸⁶⁷ BCA 2016 (NSW), s 5.23(7).

⁸⁶⁸ BCA 2016 (WA), ss 116 and 125.

⁸⁶⁹ *ibid* s 126 (2).

⁸⁷⁰ *ibid* s 116 (4).

11.2 UK

Overall, the rules for modification and termination in the UK CA-enabling laws are fragmented. Some provide procedures on how CAs can be varied and terminated, but many do not. Management agreement authorising statutes do not have this kind of detail. This silence can be interpreted that the parties to the agreement are free to decide how a particular agreement will deal with these legal matters, in the same way as a private contract.⁸⁷¹

However, the rules for conservation burdens and conservation covenants are different from those of management agreements. They provide some rules dealing with the variation and discharge (termination) of burdens.

A conservation burden holder is free to discharge a conservation burden by ‘registering against the burdened property a deed of discharge granted by or on behalf of the holder of the burden’.⁸⁷² The court (the Lands Tribunal) becomes involved where the landowner wants some change or otherwise to end the agreement and cannot get the holder’s consent, or *vice versa*. In this case, a burdened landowner or a holder who seeks to vary or discharge a conservation burden must submit an application to the Lands Tribunal.⁸⁷³ In deciding whether to allow the verification or discharge of a conservation burden, the court is required to consider various factors, including the change in circumstances since such a burden was created, and the public benefits and the enjoyment of the burdened property.⁸⁷⁴ This approach not only exemplifies a legal model for amending or discharging a CA by the court but also illustrates the intervention of public bodies in determining whether a certain CA should be changed or terminated. This reflection will be discussed again in part 12 regarding public oversight.

The discharge and modification of conservation covenants are different from those of conservation burdens. The Environment Bill provides that conservation covenants can be discharged and modified by agreement and by the court subject to detailed rules.⁸⁷⁵

⁸⁷¹ There might be some exceptional cases, where management agreement enabling statutes provide some rules regarding the modification of management agreement compliance. For example, WCA 1981 provides the rule regarding the modification of consent given by Natural England (in this case, as an SSSI agreement holder) to allow landowners to carry out some operations prohibited in SSSIs (see WCA, s 28E(1)(3)(6)).

⁸⁷² TC(S)A 2003, s 48(1).

⁸⁷³ *ibid* s 90(1)(a).

⁸⁷⁴ *ibid* ss 98 and 100.

⁸⁷⁵ See further procedures for the modification and discharge of conservation covenants in Environment Bill, cls 112 to 115.

The latter follows a similar procedure to that for conservation burdens under TC(S)A 2003 explained above.⁸⁷⁶

11.3 USA

The USA represents the jurisdiction where conservation easements can be modified or terminated both by parties and by judicial power. The UCEA and many state conservation easement statutes, particularly those of UCEA-states, express the same or similar provisions in that conservation easements can be modified, terminated or otherwise altered or affected in the same manner as other easements. Both UCEA and some state statutes also empower the court to terminate and modify a conservation easement in light of the principles of law and equity.⁸⁷⁷

Many state conservation easement-enabling statutes follow the UCEA approach, but many others do not. This research will draw the example of the state statutes from those having comprehensive details, namely Maine, Nebraska and Rhode Island. These three states share the same rules in that, in general, conservation easements may be modified or terminated by agreement between a holder and burdened landholder. However, in certain cases, the court will take over this role.

In Maine and Rhode Island, a variation or termination which materially detracts from the conservation values intended for protection must be approved by the court and with the consent of a holder.⁸⁷⁸ In making such a decision, the court is required to consider, among other factors, the stated publicly beneficial conservation purposes. The statutes also articulate that ‘a landowner may have to pay for the increasing value of property to a holder if the variation or termination constitutes a financial benefit to a landowner’.⁸⁷⁹ In Nebraska, the statute offers an option for amending or terminating a conservation easement by an action of a landowner or holder. Both of them could ask for judicial power to vary or terminate a conservation easement by proving that a

⁸⁷⁶ Environment Bill, cl 115 and sch 16.

⁸⁷⁷ UCEA, s 3(a).

The words ‘principles of law and equity’ can be interpreted to include the ‘charitable trust common law principles’ which is fundamental to the establishment of land trusts in the USA (Bates and Burke (n 863) 15).

⁸⁷⁸ Maine, s 477-A; Rhode Island, s 34-39-5.

⁸⁷⁹ Maine, s 477-A and Rhode Island, s 34-39-5.

conservation easement in question can no longer serve the public interest or is unable to achieve a conservation purpose for which it was created.⁸⁸⁰

11.4 An analysis

Although all CA-enabling laws provide rules regarding the variation and termination of CAs, some distinctive details observed above are worth discussing in three following respects.

11.4.1 The importance of the provision of variation and termination

The first discussion involves the point concerning the role of the legal provisions about the variation and termination of CAs, where views can be divided into two strands. Some people see that parties should be able to vary or terminate CAs in the same way as a simple contract, and an additional rule is unnecessary. Others might oppose this view, and see that an additional rule governing the variation and termination should be made.⁸⁸¹

Those who see that the provision of variation and termination is unnecessary might argue that a CA is a private law instrument created voluntarily. Thus, its variation and termination should be conducted by agreement between the parties or where the agreement provides a specific condition. Setting an additional rule could place a holder in a higher position to modify or terminate the agreement, which looks unfair.⁸⁸²

Those who support the provisions of modification and terminations might argue that the lack of a governing rule could give rise to various problems. As a CA could last in perpetuity or for a long period, the person who becomes a burdened landholder will be changed over time, and some unanticipated change could happen. It is true that, on the one hand, allowing CA parties to decide whether to vary or terminate a CA could be justifiable for a perpetual or long-term CA, which is at risk of unsuccessful implementation due to the occurrence of some unanticipated change. In this regard, the variation or termination of a CA could help the successful implementation of CA by taking account of an unexpected change in the future. However, such a view might

⁸⁸⁰ Nebraska, s 76-2,114.

⁸⁸¹ Law Commission (n 45) para 7.30.

⁸⁸² See the opinion of the Central Association of Agricultural Valuers given in the Law Commission Report (ibid para 7.7).

be flawed because it could enable CA parties to thwart the conservation purpose by modifying or terminating CAs, and this could make the use of a CA worse or weaker than direct regulation.⁸⁸³ Hence, setting the conditions or rules on how CAs can be varied or terminated seem to be desirable. Apart from that, this view can be justified by the reasons that, first, providing the additional rule will help CA parties to get out of a permanent obligation even if other party is not available to agree or is being unreasonable. Second, since the main objective of CAs is to fulfil a public purpose, and in many cases, public money is spent for their implementation, it should not be in the hands of the parties alone to decide to abandon it.⁸⁸⁴

11.4.2 Actors eligible to vary or terminate a CA

The second point entails who are entitled to vary or terminate a CA. As seen from the investigation in previous parts, each jurisdiction provides different rules for this point. Some consider this point as an exclusive right of parties; others do not allow CA parties to do this freely unless approved by the court subject to conditions specified under the law. The first view might argue that a CA should be treated as a private agreement since a landowner and holder create it. Thus, these two persons are in the position to know whether a CA serves the aim of its creation or not. For this reason, they should be permitted to swap, trade, amend, release, and otherwise terminate a CA.⁸⁸⁵ Another might oppose the first view with a similar reason given in the first discussion that a CA exists to serve the public good.⁸⁸⁶ Hence, the importance of protecting the public interest suggests that a CA should be amended or extinguished through a court proceeding.⁸⁸⁷ This research views that this point should be discussed further with the point about the grounds for modification and termination below.

11.4.3 Necessity of grounds for modification or termination

As observed above, some legislation states the circumstance where a CA can be varied or cancelled, but others do not. Some confer the power on the court to decide whether a CA in question should be varied or terminated. These findings can be further

⁸⁸³ Holligan (n 72) 71.

⁸⁸⁴ Reid and Nsoh (n 17) 192.

⁸⁸⁵ C Timothy Lindstrom, 'Conservation Easements' (Letter to the Editor) (2006) 29 Wyoming Law Review 23.

⁸⁸⁶ The contradiction between these two views exemplifies the tension due to the use of a private-law instrument to secure public conservation priorities (see further discussion at Holligan (n 72) 56 and 80.

⁸⁸⁷ Burnett (n 513) 780-83,

discussed in two respects, namely the need to provide the grounds for the modification and termination, as well as the role of the court in doing these tasks.

For the first consideration, the advantages of providing the grounds for CA modification and termination could be that it justifies the reasons of the variation or termination, and this makes the change transparent and accountable. Providing the grounds for CA modification, for example, where the CA in question can no longer serve the conservation purpose initially set by its parties is desirable because it can be justified with the public why a term of CA should be changed. Also, it might be possible that CA parties agree to terminate a CA, but this is opposed by the public. Thus, providing the grounds and processes for modification or termination could reduce the downsides of the private law nature of CA which could marginalise the public transparency and accountability.⁸⁸⁸ However, it could make the change too complicated and time-consuming. It might engender the questions ‘who will decide, for instance, when a perpetual CA is no longer serving its intended public purpose?’⁸⁸⁹ And ‘who will take responsibility to amend or terminate a CA where such change arises?’

In light of the preference to provide an additional rule as the grounds for CA modification and termination, discussed above, another consideration involves the role of the courts in modifying or terminating a CA. Reid and Nsoh argue that where one party is not available or being wholly unreasonable to modify or terminate a CA, some other bodies, including the court, should come into play to resolve such a difficulty.⁸⁹⁰ The way in which the court can come into play has been illustrated and partly discussed above,⁸⁹¹ but the point to be considered here is the advantages and disadvantages if the court is conferred the power to vary or terminate a CA. As the very primary role of the court is to resolve the dispute, the court is in an appropriate position to decide whether a CA in question should be modified or terminated. The use of judicial power to deal with this matter is also appealing as it can be regarded as the oversight of CA by the public.⁸⁹² Nonetheless, the court proceedings may be time-consuming. Apart from that, there is a need to consider the circumstances where the court can do this task.

⁸⁸⁸ Reid, ‘The Privatisation of Biodiversity?’ (n 493) 225-228.

⁸⁸⁹ See more details of this discussion in Cheever and McLaughlin (n 49) 164.

⁸⁹⁰ Reid and Nsoh (n 17) 192-3.

⁸⁹¹ See the examinations of this point in section 11.2 and 11.3 and sub-section 11.4.2 above.

⁸⁹² See further examination at this point in the next part.

12. Public oversight

This part considers legal matters about public oversight stipulated in CA-enabling laws of the comparing jurisdictions. It entails the examination of whether or not and to what extent those laws provide any rules of public oversight of CAs, and considering the advantages and disadvantages of such a legal requirement.

The term ‘public oversight’ is used in two respects. First, it is an umbrella term for various processes or actions where non-CA parties are required or empowered to get involved, which reflects public oversight in the sense of public participation in environmental matters. Second, this term also covers the circumstances where burdened landholders or holders are supervised or controlled by public bodies to ensure that a CA will be implemented and enforced properly (public oversight via public bodies).⁸⁹³ Public oversight in such two respects might occur in the stage before a CA is created, the stage of implementation or enforcement, subject to the stipulation by the law.⁸⁹⁴

At the stage of creation, public oversight may take place in the form of public approval or public comment before a CA is concluded. Once a CA has been entered into, monitoring compliance may also be required. Monitoring entails setting an obligation to monitor CA implementation. Monitoring by a holder may involve the actions of keeping a record for itself or for reporting an implementation result to a public body. Public oversight also includes involvement by communities or individuals. It could be done in the form of a requirement of making information regarding CA implementation available to people and enable them to bring a case to the court where the breach of a CA obligation causes significant environmental impacts. Apart from that, public oversight may take place where it is proposed to vary or terminate a CA, as observed from the variation and termination of CA by the court in the previous part.

Several explanations are suggested as to why this matter is essential to the conservation of features on land by a private legal tool. Some observe that CAs may involve the use of public funds to encourage landholders to conserve biodiversity on their land for

⁸⁹³ The oversight by public bodies should be regarded as public oversight because, under the general rule of administrative law of many jurisdictions, there is room to the public to review the operation of public bodies (administrative actions) where the law confers the power on them to do particular tasks.

⁸⁹⁴ Law Commission (n 45) para 4.86.

public goods. Hence, the implementation of CAs with the use of public oversight, as an alternative to direct regulation, would help achieve a particular goal or purpose for public goods.⁸⁹⁵

12.1 Australia

Overall, there are some legal measures regarded as public oversight in place in Australia. The Commonwealth legislation briefly provides that parties to a conservation agreement might agree to create a monitoring system,⁸⁹⁶ and this could be regarded as public oversight mentioned above because one of the parties is a public body (the Minister).⁸⁹⁷ The WA legislation has no explicit requirement of oversight or monitoring, but the law enables parties to agree to implement a plan for the management of agreement land.⁸⁹⁸ Some scholars question such lack of provision for monitoring, in that it could lead to ambiguity in the standard and approach of monitoring.⁸⁹⁹ However, in practice, public oversight by monitoring and report is required for a CA with financial assistance⁹⁰⁰ or where parties to a CA agree to set an overseeing clause. For example, a conservation agreement may entitle the Commonwealth agency to access and inspect the land under this conservation agreement for monitoring compliance and taking any action that is required to remedy or monitor any breach of this conservation agreement.⁹⁰¹

The law of NSW seems to be one providing details of oversight. For example, once registered and entered into, the NSW legislation requires the Environment Agency Head to make information regarding public registers of privately-owned land conservation agreements available on a government website and be made available on request by any person on payment of a reasonable fee.⁹⁰² Although this legislation has no explicit provision requiring inclusion of a clause for monitoring compliance, in

⁸⁹⁵ *ibid* para 4.87; Reid and Nsoh (n 17) 192; McLaughlin and Pidot (n 22) 842-46.

⁸⁹⁶ EPBCA 1999, s 306 (1)(c).

⁸⁹⁷ See the identification why this type of oversight should be regarded as public oversight at the beginning paragraph of this part.

⁸⁹⁸ BCA 2016 (WA), s 115 (2)(e) and (3)(j).

⁸⁹⁹ James Fitzsimons and Ben Carr, 'Conservation Covenants on Private Land: Issues with Measuring and Achieving Biodiversity Outcomes in Australia' (2014) 54 *Environmental Management* 606, 614.

⁹⁰⁰ Fitzsimons and Carr (n 860) 17.

⁹⁰¹ See the conservation agreement made between the Minister for the Environment and Peet Southern JV Pty Limited (the Participant) cl 8.1. A full version of this Agreement can be accessed from Department of the Environment and Energy (n 182).

⁹⁰² BCA 2016 (NSW) s 5.12.

practice, the Biodiversity Conservation Trust usually prepares a draft conservation agreement which requires a landowner to, among the other things, inspect and survey the agreement land.⁹⁰³ In the stage of enforcement, as mentioned in part 8, NSW also entitles anyone to bring a civil action for the breach of obligations.⁹⁰⁴

12.2 UK

In the UK, provisions requiring public oversight are rarely found, but some provisions under the Environment Bill and WCA 1981 seem to be an exception. Regarding WCA 1981 as a statute authorising the creation of management agreement, it confers the power of entry to an authorised person to enter into the land for various grounds. One among them is to ascertain the compliance with the term of a management agreement.⁹⁰⁵

The Environment Bill, on the other hand, sets the rule requiring the specified holders to report the information about conservation covenants to the Secretary of the State annually. The annual return reported to the Secretary of State must provide the information regarding the number of conservation covenants and areas of land held by such holders.⁹⁰⁶

It is to be noted that the scarcity of provisions regarding public oversight does not mean that public oversight is not implemented for CAs in the UK. In fact, it is in the very nature of the limited number of holders means that they are subject to public oversight, either as public authorities (political accountability, public audit, judicial review, Freedom of Information) or as charities (Charity Commission).⁹⁰⁷ Apart from that, the right to access to environmental information, recognised in the UK, is regarded as a means of overseeing the implementation by the public. It means that where CAs are made between public authorities as a holder and landowners, the

⁹⁰³ Biodiversity Conservation Regulation, cl 12.

⁹⁰⁴ BCA 2016 (NSW), s 13.15(1).

It is to be noted that BCA 2016 (NSW) authorises both the Minister, as a holder, and any person to bring a civil action to the court with no priority. This might be problematic in that both the Minister and other people may seek to file the same case to the court, and this could give rise a duplicity of case in the court.

⁹⁰⁵ WCA 1981, s 51(h).

⁹⁰⁶ Environment Bill, cl 121.

⁹⁰⁷ See Reid and Nsoh (n 17) 187; Law Commission (n 45) para 4.5

information relevant to such CAs are regarded as environmental information subject to the access by the public under some environmental information-related statutes.⁹⁰⁸

12.3 USA

The USA represents the jurisdiction providing the most exhaustive details of how the public can oversee conservation easements. The possible explanation for this could be that because a large number of public and non-public bodies can come into play as a holder, and this requires tighter rules for overseeing these qualified bodies. Although UCEA and many state statutes contain no provision requiring this matter,⁹⁰⁹ it can be observed from the provision of some state statutes.

In the stage of creation, many states require public review before a conservation easement will be created or registered. Massachusetts requires that the heads of certain public bodies must approve a conservation easement held by them depending on the purposes of the easements and the identity of the holders.⁹¹⁰ Nebraska requires municipal or county approval of all easements, except for state-held easements, to minimise conflicts with land-use planning.⁹¹¹

Additionally, many state laws provide a similar measure enabling non-parties to enforce the burdens of conservation easements where parties or other persons violate an obligation of a conservation easement.⁹¹² The enforcement by non-parties in court can be categorised into (1) enforcement by the entities having a third-party right of enforcement⁹¹³ and (2) enforcement by certain authorised bodies or person. The enforcement by persons in the first category may happen where the parties who entered into a conservation easement agreed to set this type of right of enforcement.⁹¹⁴ This

⁹⁰⁸ See Environmental Information Regulations 2004, SI 2004/3391, regs 2, 3 and 5; Environmental Information (Scotland) Regulations 2004, SI 2004/520, regs 2 and 5. See also Kevin Dunion, *Freedom of Information in Scotland in Practice* (Dundee University Press 2011) Ch 2;

⁹⁰⁹ Levin (n 513) 13.

McLaughlin and Pidot explain the reasons for the exclusion of public oversight provisions from UCEA on the grounds of, among the others, avoiding the complexity of conservation easement governance (McLaughlin and Pidot (n 22) 838).

⁹¹⁰ Massachusetts, s 32.

⁹¹¹ Nebraska, s 76-2,112 (3).

⁹¹² For example, Alaska, s 34.17.020.

While UCEA-based states have a provision covering this legal matter, the majority of non-UCEA states do not provide whether third-party of enforcement can be created or not (see Jay (n 775) 764).

⁹¹³ This type of right can be exclusively granted to a governmental body, charitable corporation, charitable association, or charitable trust. See the provisions in UCEA, s 1 and those of many UCEA-state statutes.

⁹¹⁴ This feature is reflected in the definition of ‘third-party right of enforcement’ in UCEA and most UCEA-state statutes.

thesis regards third-party enforcement as a form of public oversight because the actors eligible to enforce are those who are not the parties, which reflects a characteristic of oversight by the public.

Apart from the right to enforce conservation easements by a third-party prearranged in a conservation easement, many state statutes also authorise certain bodies or person to enforce conservation easements with specific conditions. For instance, Connecticut confers the power to enforce the public interest in a conservation easement on the Attorney General.⁹¹⁵ Arizona authorises a governmental body to take a judicial action where the holder is no longer in existence, and there is no third-party right of enforcement.⁹¹⁶ Illinois confers the right to bring an action on the neighbour who owns or possesses property nearby the burdened property.⁹¹⁷

12.4 An analysis

The examination in the previous sections indicates the fragmentation of the use of public oversight in CA implementation. It does not explicitly appear in the Commonwealth and WA laws in Australia. In the UK, most statutes do not provide this matter similar to that in majority states in the USA. However, the appearance of this provision in some statutes could raise the question of why do they stipulate legal requirements for overseeing a CA by the public or individuals in the laws? What are their benefits and drawbacks?

12.4.1 The need for an element of public oversight

Although the desirability of oversight provisions must be considered in the context of the specific measures, there should be some general discussion of whether such arrangements are necessary or not. This discussion does not seek an exact answer but seeks to identify their benefits and drawbacks.

Legal provisions about public oversight may look attractive for a law-maker for various reasons. Some consider public oversight as a mechanism to guarantee the achievement of the public interest, accountability and transparency, specifically, where a holder is a non-governmental body.⁹¹⁸ For instance, public comment by relevant governmental bodies whether a CA in question is consistent with local land-

⁹¹⁵ Connecticut, s 47-42c.

⁹¹⁶ Arizona, s 33-273.

⁹¹⁷ Illinois, s 4(3).

⁹¹⁸ Law Commission (n 45) para 4.87.

use planning or not would justify that a purpose of implementing such a CA conforms to the public interest served by a local authority. Moreover, where a government uses public money to support the implementation, public oversight helps justify the use of public investment in CAs.⁹¹⁹ Another positive dimension is about the enhancement of environmental and social justice. A particular form of public involvement, e.g. to make information available to the public or public consultation, could be seen as a way of increasing better decision-making by enhancing the transparency of environmental justice.⁹²⁰ However, some point out that public oversight is unnecessary or burdensome. Such provision might be not needed if governmental bodies alone are assigned to hold a CA⁹²¹ because, presumably, such bodies are screened for their qualifications before becoming eligible holders, and this could guarantee their capacity in overseeing a CA.⁹²² At the same time, oversight provisions could increase the level of CA governance, make a governing regime too complicated both in administrative and financial matters.⁹²³ Some observers also note that the use of public oversight might detract from the legal nature of a CA, which is a private law instrument.⁹²⁴

12.4.2 Advantages and disadvantages of the oversight by public comment, monitoring and public involvement

As public oversight could be introduced before the creation, during the implementation, for the enforcement, variation and termination of CAs in various forms, it is worth discussing some advantages and disadvantages of the oversight by means of public comment, monitoring and public involvement.

Public oversight could happen in the form of the requirements of commenting or approval by relevant public bodies and by public consultation before a CA takes effect. Such a pre-implementation process is desirable because it helps ensure that measures implemented by a bound landowner will be consistent with other land-use instruments. This process also enables a holder and landowner to know the concerns or issues raised by non-parties before formal implementation will be launched. However, this process

⁹¹⁹ *ibid* para 4.87; Owley (n 643) 14.

⁹²⁰ Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 *Oxford Journal of Legal Studies* 415, 416.

⁹²¹ Law Commission (n 45) para 4.85.

⁹²² *ibid* para 4.88.

⁹²³ *ibid*.

⁹²⁴ *ibid* para 4.91.

could have some drawbacks. For instance, public consultation is time-consuming⁹²⁵ and might increase the costs of negotiation and implementation of a CA. There might be a risk that a CA will not be entered into if the law requires public approval. Additionally, the disclosure of some pieces of information during a public consultation process, for instance, those about landowner's names, locations of the proposed land, and natural and commercial features on the land, might increase the concern about privacy and confidentiality, similar to the disclosure of CA-related information discussed in sub-section 10.4.3 above.

After a CA is created, oversight can be in the form of making information available to the public and monitoring compliance and reporting. The availability of information is a vital element enabling non-parties to participate in the implementation of land conservation through a CA. It not only makes CA implementation credible,⁹²⁶ but also helps prevent land-use conflicts among landowners and people in a relevant area.⁹²⁷ Assume that a CA is created for biodiversity offsetting. Natural features on one parcel of land will be conserved, but those found on another place will be harmed from the development on that land, equivalent to those conserved on the first parcel of land.⁹²⁸ If the parties to a CA do not disclose relevant information on what values are being conserved and degraded on the stewardship and offsetting parcels of land, the implementation of this type of CA will be questioned or opposed. However, there must be consideration of which pieces of information will be publicised and which will not.⁹²⁹ Another challenge is about the form and place where CA-related information will be publicised. Registration of a CA is indeed necessary as justified in part 10 above, but the point of whether and how to make information available are questionable. Some noted that the recordation of a CA just in the deed to the property could be hard to find and understand.⁹³⁰

Monitoring compliance is another tool commonly required under various CA-enabling statutes, specifically in the USA. It could help indicate whether or not CA implementation will succeed and meet the targets or goals initially set when it is

⁹²⁵ Environmental Law Institute (n 512) 20.

⁹²⁶ Morris and Rissman (n 827) 1282.

⁹²⁷ Holligan (n 72) 72.

⁹²⁸ Reid and Nsoh (n 17) 131; Business and Biodiversity Offsets Programme (BBOP), *Biodiversity Offset Design Handbook* (BBOP 2009) 6.

⁹²⁹ Holligan (n 72) 73

⁹³⁰ Morris and Rissman (n 827) 1242.

created. At the same time, tracking the progress of the implementation over the period of time could make a CA active and not forgotten.⁹³¹ Nevertheless, the use of monitoring is burdensome in many aspects. Empirical study of conservation covenants in Australia in 2014 showed that effective monitoring requires resources to monitor, including staff numbers and time. Furthermore, the measurement of the success of implementation requires benchmark data and length of time.⁹³² Additionally, it might be challenging to monitor the agreement land where the size of the land is vast, remote and likely to be subdivided in the future.⁹³³

As mentioned in sub-section 9.4.2, non-CA parties could be eligible to enforce a CA where the breach of particular CA obligations arise in NSW and some states of the USA.⁹³⁴ This is an example of public oversight in the stage of CA enforcement. The rare appearance of this provision reflects that whether to introduce this measure might be debatable. Some might argue that a CA is an agreement between a holder and bound landowner. Thus, enforcing the obligation should be an exclusive right of the parties rather than to open for non-parties.⁹³⁵ The risk of being sued by various persons could discourage a prospective landowner from entering into a CA. At the same time, it would detract from the voluntary nature of a private law agreement. However, some observers argue that conferring the right to bring a civil proceeding to non-parties could support the encouragement of public involvement, which is necessary to secure public benefits.⁹³⁶ It also could be used as a last resort of litigation where a holder is reluctant to enforce a burdened landholder as discussed in sub-section 8.4.2 above.⁹³⁷

13. Compatibility with existing relevant conservation tools and laws

After the legal components of a CA have been investigated above, the issue of how an individual CA works with other conservation tools should be examined. This part involves the examination of whether and how a specific CA-enabling law interacts

⁹³¹ Reid and Nsoh (n 17) 197.

⁹³² Fitzsimons and Carr (n 899) 614; McLaughlin and Pidot (n 22) 141.

⁹³³ Pidot (n 633) 18.

⁹³⁴ In NSW, BCA 2016 (NSW) allows everyone to sue a civil action where a bound landowner breaches an obligation of a biodiversity stewardship agreement. In Illinois, a neighbour who owns the land adjacent to the property subject to a conservation easement is entitled to sue a bound landowner who willfully violates a term of a conservation easement.

⁹³⁵ Reid and Nsoh (n 17) 199.

⁹³⁶ Holligan (n 72) 55.

⁹³⁷ Reid and Nsoh (n 17) 197.

with existing regulatory tools. This investigation helps this thesis justify the role of CAs in the nature conservation regime of each jurisdiction. It also helps to decide whether a CA-enabling law should be introduced as a stand-alone statute or be part of nature conservation law.

Apart from that, the very nature of CAs, as a private tool used to serve the public interest, engenders a tension between the achievement of public and private interests, as mentioned in section 1.2 of chapter 2. The examination in this part will illustrate how the comparator jurisdictions provide legal provisions in dealing with this tension. The need to develop a new legal tool to work alongside nature conservation and land use regulation in Thailand also makes this worth examining.

In general, CAs can work with several roles. A CA-enabling law might set them as a subsidiary tool to serve a specific conservation aim, as seen from an SSSI agreement concluded to restrict the exercise of rights over the land designated as a reserved area (SSSI). In many cases, CAs could be an optional instrument and work as a scheme encouraging landowners to work beyond a minimum standard of governmental regulation. These two attributes make the legal effect of CAs interact with the application of other legal tools. For example, CAs established for encouraging the conservation of biodiversity⁹³⁸ might requiring a landowner to refrain from or not permit activities causing land degradation, and this CA implementation might contradict an existing mining law, where mining on privately-owned land is possible.⁹³⁹ Such a legal effect begs the question of how the implementation of a CA under a specific CA-enabling law affects the implementation of other legal tools and vice versa.

Such a main question can be investigated through two sub-questions. The first is ‘what roles does a CA play among other conservation tools?’ And ‘how does a specific CA affect the implementation of other conservation or regulatory tools, and vice versa?’

⁹³⁸ For example, see a wildlife refuge agreement under BCA 2016 (NSW), s 5.27.

⁹³⁹ Some commentators add that one of the threats to the permanence of conservation on the land the CA applied to is because this type of agreement may not prevent the granting of exploration or mining licences (Vanessa M Adams and Katie Moon, ‘Security and Equity of Conservation Covenants: Contradictions of Private Protected Area Policies in Australia’ (2013) 30 Land Use Policy 114, 115).

13.1 Australia

In general, the majority of the CAs in Australia operate individually as a biodiversity conservation tool, but some of them are regarded as a legal mechanism for implementing other schemes. CAs implemented at the Commonwealth level and in WA are examples of CAs that can be implemented independently. In NSW, a biodiversity stewardship agreement is one of a few cases of CAs implementing biodiversity offsetting. Yet all of them share a common feature as a biodiversity conservation tool under the laws related to nature conservation.

The interaction between CAs and other instruments is an interesting point. Although almost all CAs operate individually, the Commonwealth and NSW legislation stipulate specific provisions regarding interaction with other legal tools. For instance, EPBCA 1999 requires the Minister to take account, among other things, whether a proposed CA is consistent with the wildlife conservation plan made under this legislation.⁹⁴⁰ After being entered into, activities covered by a conservation agreement can be taken without approval for development control under Part 3 of EPBCA 1999,⁹⁴¹ as long as they conform to the conditions specified in a conservation agreement. EPBCA 1999 also acknowledges that the activities complying with conservation agreement obligations are not offences even though such activities harm endangered species, migratory species or cetaceans protected under the lists of this Act.⁹⁴²

Under the NSW regime, BCA 2016 has some provisions illustrating how private land conservation agreements interact with mining law, nature conservation law and planning law. For instance, biodiversity stewardship agreements are terminated if the sites are reserved as national parks or other reservations.⁹⁴³ Apart from that, all private land conservation agreements can be varied or terminated if the land is granted a mining licence.⁹⁴⁴ Regarding the interaction with planning law, BCA 2016 prohibits a public authority from carrying out any development on land subject to any private land conservation agreements unless the proposed development is given consent by

⁹⁴⁰ EPBCA 1999, s 305(2)(ii).

⁹⁴¹ *ibid* s 37M.

⁹⁴² *ibid* ss 197(m), 212(m) and 231(i).

⁹⁴³ BCA 2016 (NSW), s 5.15.

⁹⁴⁴ *ibid* ss 5.18, 5.23(7) and 5.30(4).

the Minister. The Minister's consent can be granted where the development will not adversely affect, among the others, the biodiversity protected by the agreement.⁹⁴⁵

In WA, biodiversity conservation agreements and covenants are a legal tool created for achieving biodiversity conservation ends similar to other regulatory tools.⁹⁴⁶ Yet there is no provision prescribing how the implementation of these two agreements interact with other conservation tools as found in the Commonwealth regime. In the absence of provisions describing the interconnection with the wider conservation law, it might lead to some uncertainty.⁹⁴⁷

13.2 UK

The UK has both CAs that operate as a part of legal regulation, and others implemented independently to encourage landowners to carry out activities beyond a minimum legal standard. The first can be observed from some management agreements created to establish nature reserves under NPACA 1949. The latter can be seen from conservation burdens and conservation covenants.

As observed by Ross and Rowan-Robinson, management agreements are generally created to work alongside or as a part of a direct regulatory conservation tool to achieve environmental ends.⁹⁴⁸ Management agreements for the establishment of SSSIs represent CAs operating as a subsidiary tool of legal regulation for the designation of sites.⁹⁴⁹ Rodgers notes that management agreements under WCA 1981 illustrate the use of governmental power in enforcing positive management of nature conservation⁹⁵⁰ and buying out damaging development proposals from SSSIs.⁹⁵¹ In most cases, after a certain parcel of land is notified as an SSSI,⁹⁵² a competent governmental body will negotiate with a landowner of that land to conclude a management agreement to manage that land.⁹⁵³ In this case, the landowner who wants

⁹⁴⁵ *ibid* ss 5.16, 5.25 and 5.32.

⁹⁴⁶ BCA 2016 (WA), s 5.

⁹⁴⁷ However, as CAs under the WA regime are made by governmental bodies, they are part of a legal operation which is subject to review by the court. This could guarantee that, in theory, the governmental bodies entitled to create a CA may not make a CA inconsistent with the conventional C&C regulation.

⁹⁴⁸ Ross and Rowan-Robinson (n 47) 88.

⁹⁴⁹ Rodgers, *Agricultural Law* (n 490) para 13.96; Reid, *Nature Conservation Law* (n 35) para 5.5.18.

⁹⁵⁰ Rodgers, *Law of Nature Conservation* (n 493) 20.

⁹⁵¹ *ibid* 21.

⁹⁵² WCA 1981, s 3.

⁹⁵³ CA 1968, s 16, NERCA 2006, s 7 and WCA 1981, ss 28J and 28K.

to secure certain patterns of land use and give up others may agree to conclude an SSSI agreement.⁹⁵⁴ This type of agreement identifies the activities⁹⁵⁵ allowed to operate and to be restricted or to be managed so as to achieve the aim of the establishment of an SSSI.

Apart from the role as a subsidiary part of conservation regulation, the implementation of management agreements could interact with other regulatory rules, including the interplay with the provisions of nature conservation and compulsory purchase. For instance, a bound landowner can carry out operations likely to damage the flora, fauna, or geological or physiographical features with no offence if such operations conform to the terms of the management agreement or management scheme.⁹⁵⁶ Yet the breach of such an agreement might lead to the exercising of compulsory purchase the land under the SSSI agreement.⁹⁵⁷

In light of the independence and interaction of other schemes, conservation burdens in Scotland employ a different approach from that of management agreements. Scottish legislation does not provide whether and how the creation of conservation burdens affects the implementation of other conservation or land-use planning schemes. Reid notes that they can either operate independently from other conservation schemes or be implemented as a legal mechanism conveying other conservation schemes, including payments for ecosystem services.⁹⁵⁸ How they are created is exclusively by agreement between a designated conservation body and an appropriate landowner. It is closely linked to the operation of land law in that first, it shares the legal regime with other real burdens. Second, it limits the right to use a burdened property of landowners and occupiers.

The Environment Bill is an example of a provision demonstrating how conservation covenants may interact with other legal measures. For example, the Bill lays down a defence for the breach of CA obligations where burdened landholders are unable to comply with the obligations as a result of the matter beyond their control.⁹⁵⁹ This

⁹⁵⁴ Rodgers, *Agricultural Law* (n 490) para 13.96.

⁹⁵⁵ WCA 1981 calls the activities to be regulated as operations likely to damage the flora, fauna, or geological or physiographical features (see WCA 1981, s 28(4)).

⁹⁵⁶ *ibid* s 28E(3).

⁹⁵⁷ *ibid* s 28N(2)(b), CA 1968, s 15A; NPACA 1949, ss 17 and 18.

⁹⁵⁸ Colin T Reid, 'Conservation Burdens and Covenants' (2014) 165 *Scottish Planning and Environmental Law* 108, 109.

⁹⁵⁹ Environment Bill, cl 111.

includes the situation where the burdened land has been formally designated for a public purpose and compliance with the covenant's obligation would involve a breach of any statutory control applying as a result of that designation.⁹⁶⁰ The example indicates that the compliance with CA obligation can be overridden by some legal measures introduced by other laws.⁹⁶¹

13.3 USA

As examined in section 1.3, the legal landscape of conservation easement-enabling laws in the USA is very complex due to the interaction of various statutes, at both federal and state levels. Conservation easements can be concluded as an independent tool for land conservation or as a subsidiary tool of conservation regulation. Conservation easements in the latter case are created under a specific federal statute, for instance, those concluded under the Agriculture Improvement Act 2018 (Farm Bill 2018) and the Migratory Bird Hunting and Conservation Stamp Act 1934. However, as this thesis exclusively examines those established under the enabling statute of each state. This section will only examine conservation easements which operate individually rather than those working as a supplementary tool of C&C regulation.

Overall, under state statutes conservation easements can be created voluntarily and independently. They do not need to be part of a conventional conservation tool as seen in management agreements in the UK and biodiversity stewardship agreement in NSW. However, the statutes authorising the creation of conservation easements of some states provide how conservation easements could affect or be limited by the application of other legal tools.

As mentioned in section 1.3, one of the grounds for the introduction of conservation easement-enabling laws in the USA is to eradicate the impediment of creating perpetual and negative easements in gross. However, as enunciated in UCEA and many state statutes, the laws creating a conservation easement have no intention to exclude the burdened land from other means of legal controls, for instance, eminent

⁹⁶⁰ *ibid* cl 111(1)(c).

⁹⁶¹ See the discussion for the introduction of this rule, which arose from the defence for compulsory purchase at Law Commission (n 45) paras 6.56-6.65.

domain⁹⁶² and zoning. However, some states, for example, Rhode Island, set additional duties on the bodies seeking to acquire a burdened property by eminent domain to notify the purpose of intended public use to holders and pay a fee for taking.⁹⁶³

Apart from that, some state statutes require that conservation easements created in a particular jurisdiction must be consistent with some of the other legal provisions. Virginia requires that the obligation created under conservation easements must be consistent with the comprehensive plan of the area where the burdened property is located.⁹⁶⁴ Montana requires the process of public review by an appropriate local planning authority (as explained in the previous part) to minimise conflict with local comprehensive planning.⁹⁶⁵ This process is required prior to the process of recording a conservation easement on a land title.

13.4 An analysis

The examination in the previous section illustrates the fragmentation and scarcity of rules regarding the compatibility of CAs and other legal instruments. The majority of them set a CA to work independently, but not as a substitute for conventional legal regulation since CAs could work alongside other conventional conservation instruments. However, some CAs are part of the government regulatory tools. Regarding the interaction with other legal tools, a majority of CA-enabling laws set some provisions on what to do when CA implementation overlaps or conflicts with other regimes. The independence of CAs and the interaction of CAs with other legal instruments can be further discussed below.

13.4.1 The importance of independence

The independence feature of a CA could be justified with various reasons, including first, that independent CAs encourage their creation based on the negotiation of a perspective holder and landowner. Such two parties could opt into a CA where they agree that an individual piece of land should be secured by the agreement. This enables CA parties to conserve the land or features any individual or body thinks important,

⁹⁶² Eminent domain is a regulatory term used in the context of US law. In short, it refers to a means of taking private property for public use. In the USA, it is subject to the 'Takings Clause' under the US Constitution to pay just compensation (Epstein (n 75) ch 1).

⁹⁶³ Rhode Island, s 34-39-6

⁹⁶⁴ Virginia, s 10.1-1010.

⁹⁶⁵ Montana, s 76-6-206.

not just those that have been identified by the governmental policy and bodies. Second, making a CA an independent legal tool means that CAs could work without the support of C&C regulation. Land conservation by the use of CAs can help conserve some features in the areas where C&C is absent, inadequate or ineffective. Also, CA implementation can make progress even where official schemes are not strong. Third, a CA, which operates independently, is attractive in that it invites non-public organisations to come into play, while a CA running as a supplementary of government regulation may not. The cases of biodiversity stewardship agreement in NSW and management agreements in the UK, which are a mere supplementary regulatory tool, reflect that they vest the power to create a CA in certain public bodies. This means that there is no place for a non-governmental body to participate in conserving the land if a CA is a part of government regulatory scheme unless the law entitles such a body to oversee both a regulatory scheme and a CA created therein. Another reason supporting independence is that where a CA can work independently, the success and failure of the implementation of such a CA will not affect the implementation of other regulatory schemes.

However, the downsides of independence should not be overlooked. Some others may argue that setting a CA as a supplementary tool of a conventional C&C regulation could look more appealing. It is suitable for a jurisdiction where a CA has never been implemented before, and there is uncertainty whether the establishment of an independent scheme for CAs is necessary or creates a new problem in the regime of land conservation. The appeals of a dependent CA could be, firstly, that it becomes an option for the use of government regulation for conservation aims. The case of management agreements in the UK demonstrates a CA running with an existing conservation regime, which is easier to introduce as it is a part of government regulation. Second, as there is a public body in charge of implementing a conventional legal measure, there is no need to set a new body to administer a CA. While setting an independent CA might be costly and raise concerns over transparency, setting a CA as a supplementary tool exercised by a public authority could be more transparent and accountable because it is subject to a judicial review. Third, as mentioned in part 2 regarding the purposes and scope of CA implementation, the object of CA implementation, which is overseen by a public body, is likely to serve a specific public aim. Fourth, as argued by Reid, setting a CA scheme as part of the mainstream

conservation measures could make the implementation of land conservation programmes as a whole consistent, efficient and coherent.⁹⁶⁶ Such consistency, coherence and efficiency can be apparent in the case where public money is used on those programmes. It means that where a CA is one of the conservation options in the hand of governmental bodies, such bodies could prioritise which ones should be selected. And where a CA is selected, such bodies can design a scheme by targeting the land where the conservation goal is likely to succeed.⁹⁶⁷

13.4.2 The interaction with other legal instruments

In most cases, the implementation of CAs interacts with the legal tools concerning the use and restriction of the use or carrying out activities on land. This section considers how a CA can interact with other land use control-related measures. Admittedly, this examination is not comprehensive since land conservation by CA implementation interacts with a very wide range of legal tools.⁹⁶⁸ This examination will exclusively investigate the interaction of a CA with the legal provisions about nature conservation; planning; and mining activities, respectively as the illustrations of the interaction between CAs and other tools.

A. Interaction with nature reserve designation under government regulation

The starting point is that the use of nature reserve designation and CAs resemble each other in that they create some restrictions concerning the use of land.⁹⁶⁹ However, they are created from different regulatory concepts. While CAs are a privately-owned land conservation tool made voluntarily, the designation of a nature reserve is in essence a form of C&C. In many cases, the latter is undesirable due to political limitations or the legal culture of each jurisdiction.⁹⁷⁰ Nonetheless, the following cases exemplify how these regulatory options are interrelated.

⁹⁶⁶ Reid, 'The Privatisation of Biodiversity?' (n 493) 223-225.

⁹⁶⁷ *ibid.*

⁹⁶⁸ For instance, in the USA the issue whether conservation easements can be made or extinguished by eminent domain, a kind of a regulatory taking by governments, has been discussed and implemented with different rules (Levin (n 513) 41-3). In the UK, see the discussion about the legal effect of compulsory purchase on the compliance of CA obligations at Law Commission (n 45) paras 6.56-6.65.

⁹⁶⁹ Reid and Nsoh (n 17) 178.

⁹⁷⁰ The difficulty in imposing legal restrictions on the use of private land can be observed from the UK and USA. While the UK governments generally use planning instruments to control land use, the USA, on the contrary, may not be the same because of the Takings Clause under the US constitutional limits the scope of regulatory options. Thus, the US governments prefer to use private tools to manage the use of land instead (see Reid and Nsoh (n 17) 183; Owley (n 29) 1054; John D Echeverria, 'Regulating

As seen from the law of NSW, the land protected by a biodiversity conservation agreement can be released from the status under this agreement when it is designated to be a national park or other nature reserve under the National Parks and Wildlife Act 1974. Another opposite case is management agreements in the UK that could be created to secure a nature reserve status. Such a distinction indicates that a CA could interact with the legal regime of nature reserve designation in two ways. First, it can be an instrument creating protection for nature akin to a nature reserve on privately-owned land where there is no law entitling this. Second, in the case where the law allows nature reserves on privately-owned land, a CA could operate as a temporary voluntary instrument to secure such land before a competent public body decides whether to declare such land as a nature reserve. In this instance, CAs can be regarded as a more flexible alternative to direct regulation before being strengthened by the permanent status of a nature reserve under legal regulation.

B. Interaction with a legal planning regime

Although CA-enabling laws in Australia and the UK make a few provisions dealing how a CA could affect the implementation of planning regime, several conservation easement-enabling statutes in the USA illustrate how they are linked together.⁹⁷¹ The examination in the previous sections suggests at least three legal implications. First, planning permission could be prohibited or restricted to secure conservation practices on a particular piece of property under a CA, as seen from CAs implemented in NSW. Second, the content of a proposed CA might need to conform to planning requirements, or be subject to public review by a local authority in the area, as seen from the laws of Virginia and Montana. This requirement is interesting and may be worth considering because it is possible that where the land is proposed to be conserved under a perpetual agreement, a planning authority may have to consider whether to exclude such piece of land from a land-use development plan.⁹⁷² Moreover, where such proposed land is already designated to allow some development activities, the parties should know whether it is possible to conclude a CA on that land. This is a

versus Paying Land Owners to Protect the Environment' (2005) 26 Journal of Land Resources and Environmental Law 1, 11).

⁹⁷¹ See the interaction between conservation easements and a land-use planning system in Jesse J Richardson Jr and Amanda C Bernard, 'Zoning for Conservation Easements' (2011) 74 Law and Contemporary Problems 83, 96.

⁹⁷² This point is matter of legal design choice where a law-maker seeks to develop a new CA-enabling law on how to deal with the interaction (or tension) between a proposed CA and the existing planning instrument.

possible approach that has been used in the USA in recent years.⁹⁷³ Third, the very nature of CA obligations which commonly restrict the use of land might possibly conflict with land-use planning, which is likely to be changed from time to time. This reflects that CA obligations might interact with a planning rule in the manner that the first is overridden by the latter (by the subsequent permission). These possible circumstances illustrate that although CAs are useful in several respects, the implementation of this conservation tool may give rise to public-private regulatory tension.⁹⁷⁴

C. Interface with mining law

The point whether the land secured by a CA could be affected by mineral exploration and exploitation-related laws is worth considering as an example of the clash between nature conservation law and a natural resource exploitation-related regime. These two instruments can interact with each other because they entail the use of land. While a CA generally protects features found on land by restricting land use of a landowner, mining law, for instance, seeks to take valuable minerals from below the land; in many jurisdictions, minerals do not belong to a landowner, but are instead owned by the state.⁹⁷⁵ It is not surprising that CA-enabling laws of many jurisdictions, as seen from those of NSW and the USA, provide that a CA will or could be terminated if a mining licence is granted for that land. Such a legal provision has both strengths and weaknesses. On a positive side, it could be a possible way to balance economic development and environmental protection because securing the land by a CA should not prevent access to minerals underground. Apart from that, a CA is a private law instrument created by a landowner who is not the owner of minerals under the land. Hence, an instrument created by a person who is not entitled to excavate minerals should not affect the right to mine. However, another might view that this approach is human-centric and based on economic benefits. Mining operation involves land clearing, which constitutes the degradation of features on land. In the case of underground mining, conveying of minerals from a mining pit by heavy vehicles could affect the natural environment nearby a mining site. Hence, there is no compromise between economic development and environmental protection, where a CA is

⁹⁷³ McLaughlin and Pidot (n 22) 171.

⁹⁷⁴ See the discussion regarding the limitation of CAs in this aspect in Holligan (n 72) 56 and 80.

⁹⁷⁵ Fitzsimons and Carr (n 860) 6; Adams and Moon (n 939) 116.

terminated by mining approval. Some suggest that the bodies entitled to enter into a CA should make an assessment of the potential for the prospective land being granted mining licences before entering into a CA to limit this conflict.⁹⁷⁶

Conclusion

The examination in this chapter has highlighted various points about the design of laws establishing CAs which are useful when considering the development of proposed legal provisions for Thailand. This chapter studied thirteen elements of CA-enabling provisions by employing a comparative approach to compare the laws in place in Australia, the UK and the USA. It showed that those laws have many standard features, which can offer guidance in drafting the model for Thailand. The similarities and differences of those considerations uncover what can be the strengths, weaknesses or the points worth considering in the next chapter. Apart from that, this chapter revealed that, although being a voluntary tool in nature, it can function as a subsidiary tool of C&C regulation creating interaction between this tool and C&C regulation in many respects. Some functions of CA-enabling laws in the comparator jurisdictions, for example, the measures about public oversight and the enforcement for the breach of obligations and the designation of eligible holders, are the outcome of and influenced by the design choice for regulation illustrated in chapter 2 and 3. Hence, the development of new law for Thailand should consider how to make a proposed CA work alongside current direct regulation.

⁹⁷⁶ See the recommendation of EDO Tasmania, an environmental NGO in Australia, in EDO Tasmania, ‘Conservation Covenants: Options to improve Security for the Protection of Private Land in Tasmania’ (Report Prepared the North East Bioregional Network, May 2017) 12.

Chapter 6 The legal proposal for CA-enabling provisions for Thailand

Introduction

After the comparison of CA-enabling laws has been made in chapter 5, this chapter attempts to develop a legal proposal regarding CA creation for Thailand (the legal proposal). It comprises three main components embedded in the notion that this thesis supports the introduction of a set of provisions facilitating the creation of CAs as a subsidiary tool of C&C regulation⁹⁷⁷ under the existing laws in Thailand mentioned above.

Based on the position set above, the first part entails the justifications for the legal proposal. It considers what the opportunities could be. Then, it will analyse whether the existing laws relating to land rights, land-use regulation and nature conservation, examined in chapter 4, are sufficient to create CAs; or if a new set of provisions should be made. The second part entails the elaboration of how the legal proposal should be developed. This development will consider the content, structures, similarities and differences of CA-enabling laws, as well as their strengths, weaknesses and legal implications of these features as discussed in chapter 5. It will examine the legal structure, content and the justifications for the establishment of such a legal proposal. The last part will analyse the overall strengths and weaknesses of the proposal for a CA-enabling law. The primary task of this part is to identify the points that should be taken into account to make it conform to a government's policy and the environmental issues which the government seeks to solve.⁹⁷⁸

1. The justifications for the introduction of a new legal scheme

The examination of the available tools under the existing laws in Thailand and the application of CAs in the selected jurisdictions illustrated the room for the development of a new legal proposal. This part justifies the advantages of the legal proposal, and explores the limitations of the existing regime.

⁹⁷⁷ See further explanation of how these two legal approaches apply in the conclusion of chapter 2.

⁹⁷⁸ This chapter considers the justifications for the introduction of a CA-enabling law in two stages. Part 1 justifies why the legal concept of CA should be introduced into the Thai legal system. After the legal proposal has been developed, part 3 will exclusively explore the reasons why the legal proposal developed in part 2 has some strengths and weaknesses.

1.1 Opportunities arising from the introduction of the new legal proposal

The first consideration worth considering here is ‘why could the legal proposal bring about positive change in the legal regimes of land conservation and environmental regulation in Thailand?’ Although this point is partly stated in chapter 1 regarding the research contribution,⁹⁷⁹ this section reaffirms and further explains that this proposal is a chance of initiating a voluntary scheme alongside direct regulation for the conservation of nature. This regulatory approach has never appeared in the legal regimes of land conservation and environmental regulation in Thailand before. This new legal proposal would open the door for the design of a legal tool for conservation practices operated on land and enabling a CA to operate with appropriate conditions. The current land-use regulatory framework runs on the ‘one size fits all’ model, under which landowners are obligated to comply with the same rules.⁹⁸⁰ CAs offer an additional tool with a chance of receiving financial incentives to do better than a minimum requirement.⁹⁸¹ An authorised public body, as a qualified holder, and landowners are enabled to negotiate what good practice should be adopted, beyond compliance with the existing laws. They could also negotiate the proposed terms of a CA regarding the duration and other terms subject to a CA-enabling law.

1.2 Limitations of the existing legal regime in supporting the creation of CAs

The opportunities arising from the introduction of the new legal proposal explained above, are not alone sufficient to conclude that the new law should be introduced unless it is apparent that the existing laws are inappropriate or prohibit the creation of CAs. This section analyses whether the existing laws are sufficient to establish CAs or not.

As observed in chapter 4, greenhouse gas emissions are a major cause of global warming and climate change, and land clearing and burning after monocrop harvesting are one of the environmental problems in Thailand.⁹⁸² This might be worth taking as a starting point to explore what possible legal measures can be introduced if the Thai

⁹⁷⁹ See part 5, entitled ‘research originality and contributions,’ of chapter 1.

⁹⁸⁰ Gunningham argues that this regulatory characteristic is undesirable and inappropriate for various reasons (Neil Gunningham, ‘Enforcing Environmental Regulation’ (2011) *Journal of Environmental Law* 23(2) 169, 194-7).

⁹⁸¹ Godden, Peel and McDonald (n 17) 255-6.

⁹⁸² See the existence of this problem in sub-section 1.2.1 of chapter 4.

government seeks a long-term solution. The possible legal approaches might be the use of direct regulation by imposing prohibitions for land clearing and open-burning on farmland or the initiation of an eco-friendly scheme running on voluntary efforts. Assume that the second choice is employed,⁹⁸³ the question might be whether the government can implement this policy option through the established legal tools of property law and the private law of contract to secure a long-term or perpetual conservation scheme. This thesis sees various limitations when the government employs the existing legal framework to implement a CA. The limitations can be threefold, comprising the limitations arising from the private law of contract and property law as well as those caused by the existing regulatory measures regarding land-use regulation and nature conservation.

In the first place, as mentioned, there are some limits due to the very nature of contract law. Agreements made under the private law of contract are unable to impose obligations running with the land and bind a future landowner.⁹⁸⁴ Also it can be questioned whether some legal rules of contract law, for example, those regarding the revision and extinction of an agreement based on the free will of parties, are suitable or sufficient for accommodating the implementation of CAs designed to serve the public interest.⁹⁸⁵ Such limitations require the use of a legal instrument creating real rights (property rights), for instance, servitudes, for imposing such a non-possessory property right on land.

Secondly, in relation to the limits of the law of property, although some real rights can be created to impose a specific burden running with the land, including servitudes,⁹⁸⁶ this type of real right has some limitations affecting its use in establishing a CA. The existing rules of servitudes, for instance, require the existence of two parties owning two pieces of property.⁹⁸⁷ It means that the establishment of burdens running with the land with no benefited property (dominant property) is impossible. This characteristic

⁹⁸³ As mentioned in the introductory chapter, the use of a direct regulatory approach is beyond this study's scope due to its limitations in various aspects, including political unpalatability.

⁹⁸⁴ A traditional legal concept of the Thai law of contract is based upon the privity of contract coupled with an exception regarding the right of the third party articulated in s 374 of the Thai Civil and Commercial Code (CCC). See also Pattarapas Tudsri and Angkanawadee Pinkaew, '20: Third Party Beneficiaries in Thai Contract Law' in Mindy Chen-Wishart, Alexander Loke and Stefan Vogenauer (eds), *Formation and Third Party Beneficiaries* (OUP 2018) 427-8.

⁹⁸⁵ Reid and Nsoh (n 17) 191-2.

⁹⁸⁶ See the explanation of servitudes in Thai law in sub-section 2.1.3.3 of chapter 4.

⁹⁸⁷ This legal character can be observed from CCC, s 1387. See also Pramroj (n 404) 622-23.

implies that servitudes are an inappropriate tool for land conservation by conservation bodies who have no ownership on adjacent land. Additionally, it remains uncertain whether servitudes can be established in publicly-owned land. This is because there are various sub-types of publicly-owned land, and they are governed with different rules under different laws.⁹⁸⁸ To date, there is no case in the Thai Supreme Court deciding whether public bodies who own publicly-owned land are entitled to create a servitude or not. In practice, servitudes are a private-law instrument mainly used by private parties rather than used between public bodies and individuals. Apart from that, the burdens imposed by a servitude are limited to the negative ones. This means that the creation of positive burdens, for example, to plant trees on arable land for carbon sequestration⁹⁸⁹ instead of that of mono-crops, is impossible under the existing rules.⁹⁹⁰ Some might point out that if the law were changed to allow the creation of a perpetual and ‘in gross’ servitude to impose positive obligations on servient landowners, there would be no need to establish CAs by a specific legal proposal.⁹⁹¹ This thesis sees this approach as out of the scope of this study, and might be unwelcome as it could bring about significant change to the legal regime of servitudes, which is not a legal tool directly created to serve the fulfilment of the public interest.

Thirdly, it is true that there are plenty of land-use control and nature conservation related-measures in place for the conservation of features on land;⁹⁹² and the availability of these measures is worth considering to see whether they support or oppose the creation of CAs. As examined in chapter 4, the established legal measures do not oppose the creation of CAs working as an additional option. Nonetheless, due to the absence of statutory authorisation conferring power to create CAs, it remains questionable whether CAs created by those bodies are legally binding or not. This could make the creation of a CA with no legal authorisation an illegal administrative

⁹⁸⁸ See the explanation in this point in sub-section 2.1.4 of chapter 4.

⁹⁸⁹ Ross W Gorte, ‘Carbon Sequestration in Forests’ (CRS Report for Congress, Order Code RL31432, 2007) 1-5.

⁹⁹⁰ See the text of CCC, s 1387 which provides that an owner of servient property is under the burden to allow an owner of dominant property to do some activities on the servient property. This can be interpreted to mean that servitudes under the Thai law exclusively impose a negative burden.

⁹⁹¹ In a report studying the application of the concepts of CAs in European countries, the author suggested that the legal amendment of the nature of servitudes by adding specific features could be an alternative way enabling servitudes to act as a legal instrument to create CAs (Racinska and Vahtrus (n 61) 31).

⁹⁹² See the concept of land-use regulation in Thai laws in section 2.2 of chapter 4.

act subject to the *ultra vires* principle under the Thai administrative law.⁹⁹³ Additionally, the use of agreements by governmental bodies may be at risk of having no legally binding effect where there is no legal provision allowing this task.⁹⁹⁴

Some might suggest that the introduction of a new land-use regulatory measure might be another alternative option. Nonetheless, as stated in chapter 1, it is out of the scope of this study and subject to political unpalatability. This makes the introduction of the legal proposal entitling specific bodies to make CAs appealing from the perspective of this study. Also, providing legal rules in creating CAs is attractive as it sweeps away the limitation regarding the absence of legal status and of the binding effect of voluntary agreements observed in chapter 3.⁹⁹⁵

From the Thai property law perspective, the establishment of CA burdens running with the land is the creation of a new property right on land, and the Thai law requires that a new type of property right can be established only by legal authorisation. This means that the establishment of CAs needs a specific set of governing rules. The examinations in parts 2 and 3 below will illustrate how a specific legal scheme constituting the legal proposal can be formulated, and what can be its strengths and weaknesses.

2. The possible legal provisions for Thailand

In chapter 5, the thesis identified critical elements of CA-enabling laws compared between three jurisdictions and discussed some advantages and disadvantages found in those jurisdictions. This part seeks to develop a possible structure and normative content of CA-enabling provisions for Thailand. The provisions will be formulated by utilising legal arguments discussed in the previous chapter in combination with the legal background of the country examined in chapter 4. A primary point to be discussed in this section is how should the legal proposal for the creation of CAs be formulated?

2.1 The strategies for the elaboration of the provisions in sections 2.2 – 2.14

Proposal:

⁹⁹³ Peter Leyland, 'Droit Administratif' Thai Style: A Comparative Analysis of the Administrative Courts in Thailand' (2010) 8 Australian Journal of Asian Law 121, 135-6.

⁹⁹⁴ Moffet and Bregha (n 339) 26.

⁹⁹⁵ See section 3.1 and sub-section 5.3.3 of chapter 3.

The provisions constituting a CA-enabling framework in sections 2.2-2.14 will be based on two strategies, namely the simplicity of the proposed legal provisions and the attractiveness of the provisions encouraging the rate of CA uptake.

It is essential to consider at the beginning what should be the overarching rules or strategies, which this thesis employs to develop the structures and legal content of the proposals in sections 2.2 –2.14. Two rules are set here. The first is the simplicity of the legal proposal, and the latter is the attractiveness of the provisions to support CA uptake. The employment of these rules is justified below. The primary justification for the establishment of these two strategies stems from the need to move a new legal proposal away from C&C regulation and the encouragement of the participation based on a voluntary basis.⁹⁹⁶

2.1.1 The simplicity of the proposed legal provisions

This thesis sees that the provisions being formulated in sections 2.2-2.14 below should be simple and flexible, allowing parties to draft different terms in different situations. This thesis sees the legal proposal as laying down the fundamental rules for CA governance. The legal matters which are not stated in the legal proposal, e.g. rules of contract interpretation and legal definition of real property, should be subject to those in place under the private law of property and contract.

2.1.2 The attractiveness of the provisions encouraging the rate of CA uptake

This thesis argues for the creation of attractive provisions through the formulation of features which are likely to induce landowner participation (e.g. by the offer of incentives), and do not impose burdensome provisions. The legal proposal should be drafted in light of the encouragement of agricultural landowners to conserve natural features on their land with both negative and positive burdens.⁹⁹⁷ Such a character argues against complicated rules which could demotivate landowners against entering into a CA. A specific point on how to design the proposed provisions to meet this

⁹⁹⁶ As mentioned in sub-section 2.1.1 of chapter 2, setting a complicated rule can be seen as a downside of C&C regulation. See also Baldwin, Cave, and Lodge (n 95) 108; Gunningham, Grabosky and Sinclair (n 2) 46.

⁹⁹⁷ The reason for this stems from the focus of this study which mainly seeks to deal with land degradation and contamination from agricultural practices.

requirement will be seen in each legal consideration.⁹⁹⁸ This requirement stems from the necessity to mitigate the weakness arising from a voluntary characteristic of voluntary agreement observed in chapter 3 regarding the difficulty in predicting the rate of uptake and success of CA implementation.⁹⁹⁹

2.2 The purpose for which a CA can be created

Proposal:

The purposes and scope of the implementation of CAs should address the intention to use a CA for the conservation of natural features on land with the aim to serve the public interest. The definition of the term ‘conservation’ should be made by including ‘the protection, restoration or enhancement of natural features’ on land.

The first legal matter worth discussing for the proposal is the purpose for which a CA can be created. This legal matter can be sub-divided for the sake of discussion into three elements, comprising the actions sought to be captured, features to be conserved, and the achievement of the public interest.

Regarding the actions sought to be captured, although the conclusion from the comparative chapter reveals the fragmentation of the group of actions used for fulfilling conservation purposes, this study considers that the term ‘conservation’ should be employed as an umbrella term for the actions to be fulfilled. As summarised in the previous chapter,¹⁰⁰⁰ ‘conservation’ is a catch-all word for other eco-friendly actions,¹⁰⁰¹ entitling CA parties to decide which specific actions (e.g. to preserve, maintain or improve), are the most suitable ones. It is also attractive due to a dynamic meaning reflecting scientific discovery in each period.¹⁰⁰² This means that the tasks burdened landholder are obliged to do can be changed from time to time subject to the availability of features found on the burdened land. For instance, if a CA requires a landowner to conserve natural features on a burdened land, the landowner may fulfil

⁹⁹⁸ As will be seen in the following sections, this thesis does not deny the necessity of having a certain level of legal regulation in the proposed CA framework, but instead intends to develop one which avoids the creating of unnecessary governing rules.

⁹⁹⁹ See sub-section 5.3.1 of chapter 3.

¹⁰⁰⁰ See sub-section 2.4.1 of chapter 5.

¹⁰⁰¹ IUCN (n 562) pt 1, para 4.

¹⁰⁰² Law Commission (n 45) para 4.33.

this obligation with several tasks, including refraining from changing land use, maintaining water quality, preserving wildlife habitats and avoiding the cutting down of trees on the land. These tasks fall under the umbrella of the obligation ‘to conserve natural features on land’.

As observed in chapter 4, the meaning of conservation has never been defined under Thai environmental law, a legislative definition is necessary for assisting in interpreting a possible range of actions under the term conservation. However, there are different views on its meaning.¹⁰⁰³ The elaboration of this meaning by referring to well-established words could be desirable. This approach has been used in the Environment Bill discussed in chapter 5. It suggests the range of words ‘protect, restore and enhance’ as part of the meaning of conservation.¹⁰⁰⁴ This could be an example of the words being employed in the legal proposal for Thailand.

Regarding the features which should be conserved, the previous chapter categorises two main features and values can be conserved by CAs, comprising natural features and cultural heritage.¹⁰⁰⁵ The question here is ‘should the proposed CA-enabling law use a CA to conserve both natural and cultural heritage?’ This thesis sees that two reasons can support the implementation of CAs to conserve natural features. First, as the critical environmental problems examined in chapter 4¹⁰⁰⁶ involve the degradation of environmental features from humans, CA implementation should serve this task. Second, in light of the capacity of an eligible holder¹⁰⁰⁷ and a type of law authorising CA,¹⁰⁰⁸ the legal proposal should be implemented as a legal tool under a specific nature conservation law and can be used by a specific public body due to various justifications as will be explained in the later sections.¹⁰⁰⁹ Hence, the features eligible to be conserved are limited to natural features.¹⁰¹⁰

¹⁰⁰³ See different views about the meaning of the term conservation in sub-section 2.4.1 of chapter 5.

¹⁰⁰⁴ See Environment Bill, cl 102(4).

¹⁰⁰⁵ See sub-section 2.4.2 of chapter 5.

¹⁰⁰⁶ See the problems and the potential use of CAs in the context of Thailand in section 1.2 of chapter 4.

¹⁰⁰⁷ See a body eligible to hold a CA in the next sub-section.

¹⁰⁰⁸ See the point on how a CA-enabling law can be formulated as part of environmental law in section 2.14.

¹⁰⁰⁹ See the justification for this conclusion in sections 2.3 and 2.14 below.

¹⁰¹⁰ As stated in sub-section 2.1.1 above, this thesis argues that the legal proposal should be simple and provide a broad rule, which enables a qualified holder to consider which conservation-related activities are suitable for the implementation by this tool. Hence, the term ‘natural features’ is appropriate as it covers ecosystems, biodiversity and natural resources.

The last point to be visited is a requirement of public interest. The previous chapters emphasise that CAs are a private-law instrument seeking to serve the public interest.¹⁰¹¹ This character should be emphasised to demonstrate how CAs are different from servitudes under private law. By setting a limited range of purposes for a CA and an eligible holder,¹⁰¹² every CA should, by its very nature, be serving the public interest.¹⁰¹³ Yet it is desirable to reinforce this by adding an express qualification that the terms of the agreement should be in the public interest.

2.3 Eligible holders

Proposal:

The legal proposal should initially vest the power to create a CA in a specified conservation body rather than setting a list of qualified holders or allow non-public organisations to play this task.

After the purposes and scope of the implementation of CAs have been settled, another point to be made here is who should be set as a qualified holder. The examination in the previous chapter shows the different legal approaches dealing with this matter among the three jurisdictions.¹⁰¹⁴ The question here is ‘which way is the most appropriate for Thailand?’

Although the desirability of encouraging non-public bodies to participate in the conservation of biodiversity is important for the enhancement of environmental governance,¹⁰¹⁵ they may not be suitable to play the role of an eligible holder. This research considers that, at the initial stage of implementing CAs in the country, a proposed CA-enabling law should primarily vest the power to create a CA in a specified conservation body rather than setting a list of qualified holders to play this task. Admittedly, this approach has some disadvantages. For instance, it considers a

¹⁰¹¹ See part 6 of chapter 1 and sub-section 2.4.3 of chapter 5.

¹⁰¹² See the consideration about eligible holder in section 2.3 below.

¹⁰¹³ Above all, this thesis secures public interest achievement by requiring additional conditions to be discussed in the latter sections. These include the requirements of registration and conformity of the existing laws being examined in sections 2.11 and 2.14.

¹⁰¹⁴ See the difference in this point in section 4.4 of chapter 5.

¹⁰¹⁵ Anna Wesselink and others, ‘Rationales for Public Participation in Environmental Policy and Governance: Practitioners’ Perspectives’ (2011) 43 *Environment and Planning* 2688.

CA as a formal governmental tool rather than making it a further step towards land-use governance by multiple players. When the designated governmental bodies do not enter into a CA, this legal tool will not be implemented.

Nonetheless, this research argues that those concerns are overwhelmed by the merits of the designation of certain public bodies as a qualified holder. First, it helps to avoid the complexity of a governing regime for CA holders. There is no need to consider who can create and hold the benefit arising from a CA as well as the need to create a holder of a last resort because it is clear who can be a holder and the continuity of operation of governmental bodies will cover future changes. At the same time, vesting the power to create a CA in a specific body is advantageous in that a specific public body has capacity to establish a system for the compilation of CA related-information, and make it available online easily.¹⁰¹⁶ Second, it can provide accountability and transparency in the work operated by a holder since agreeing and implementing a CA becomes a public task carried out by governmental bodies. This attribute enables non-governmental bodies or the public to review the exercise of power in conserving the land through a CA. Apart from that, there are in Thailand few non-governmental bodies looking after natural features in the country.¹⁰¹⁷ Many of them are established to deal with environmental issues in general rather than being set for a land stewardship aim.¹⁰¹⁸ Hence, there is long way to go to encourage the establishment of non-governmental conservation bodies aiming at looking after the land akin to land trusts in the USA and the range of bodies in the UK. For these reasons, the role in holding the benefit arising from a CA should vest in governmental bodies at the initial stage of this legal development.

It is to be noted here that, although the role in governing a CA as a holder is designated to specific public bodies, it does not mean that non-governmental organisations and the public have no role in CA governance. These two actors can participate in overseeing a CA as will be discussed and suggested in sections 2.9 and 2.13 below.

¹⁰¹⁶ This consideration will be discussed and justified in section 2.11 below.

¹⁰¹⁷ A prescriptive list of the Thai environmental NGOs registered under the requirement of the Law on Enhancement and Conservation of National Environmental Quality can be accessed from Department of Environmental Quality Promotion, 'List of Accredited NGOs Registered for Environmental Protection and Natural Resource Conservation' (Update 18 April 2017) <www.deqp.go.th> accessed 14 May 2020.

¹⁰¹⁸ See Srisuwan Chanya, 'Development and Roles of Non-governmental Organisations in Thailand' (2007) 3 *Journal of Environmental Management* 85, 87-8.

2.4 Eligible land

Proposal:

The legal proposal should provide a provision regarding the areas eligible. The area eligible for the creation of CAs should be the land rightfully possessed or owned by eligible persons, including those having the right to farm on publicly-owned land, regardless of the purposes of its use or its physical nature.

The investigation in the previous chapter reveals that majority of CA-enabling laws do not contain any specific rules regarding the qualification of land to be conserved by CAs.¹⁰¹⁹ The point to be discussed here is whether a legal model for Thailand should follow those jurisdictions with no specific requirement, or develop its own unique provision. Legal consideration will be divided into three points, comprising those relating to: 1) the physical nature of eligible land; 2) purposes of the use of eligible land; 3) private and public ownership.

Regarding the physical nature of eligible land, although maritime and water areas can be subject to CA conservation, the legal regime of property rights governing these areas is complicated.¹⁰²⁰ The inclusion of these areas might constitute a difficulty in introducing a CA to Thailand. Also, it is inconsistent with the goals of simplicity and attractiveness set in section 2.1 above. Hence, the primary area to be conserved at an initial step of the implementation should be limited to the land where property rights remain defined. Setting land as an eligible area is desirable because it is easy to identify a burdened landholder. Additionally, clear identification of the eligible area makes the draft of the provision regarding the purpose of CA clearer since the natural features found on land and marine areas are different.¹⁰²¹

Regarding the purposes of the use of eligible land, while the laws examined in chapter 5 do not provide any specification of eligible land, the question here is whether the

¹⁰¹⁹ See this demonstration in sections 3.1 - 3.3 of chapter 5.

¹⁰²⁰ See this demonstration in sub-section 3.4.2 of chapter 5.

¹⁰²¹ For example, the identification of which species are conserved on a particular piece of land seems to be easier than in marine areas, where many migratory species move from one area under a certain jurisdiction to another regardless whether it is under the jurisdictions of one state or not (Reid, 'Protection of Sites' (n 608) 848-9).

legal proposal should be exclusively offered for agricultural land. This thesis observes that the specification of eligible areas from its current purpose might be problematic and give rise to the complexity of a proposed framework due to various reasons.¹⁰²² First, it is ambiguous what falls within the definition of ‘agricultural land’. For instance, it might be questionable whether both pastureland and forestland are under the meaning of ‘agricultural land’. Second, making some specification about the purpose of land use might leave a landowner who seeks to change a land-use pattern from residential or industrial areas to be forestland unable to make a CA. There may be land used for other purposes, including those being used as woodland or public space that are appropriate to be conserved by a CA. Hence, setting a specific current use for the land could hinder the rate of uptake. For these reasons, this thesis suggests that the scope of eligible areas should be land but not include water or maritime areas where a land title remains undefined. Such eligible land could be private or publicly-owned land where a burdened landholder can fulfil the obligation in conserving agreed features. This suggestion conforms to the need to introduce CAs to solve environmental problems on land as identified in chapter 4.¹⁰²³

Regarding the types of land considered from the perspective of private and public ownership, CAs in some jurisdictions can be created on both privately- or publicly-owned land, but some intentionally used this legal tool to conserve private property. The question here is ‘should a proposed CA-enabling law in Thailand be used exclusively for privately-owned land?’ As discussed in chapter 4, around 12 percent of the country’s area is agricultural land owned by the Thai government, and the government grants the right to farm to farmers. This type of land is suffering from intensive monocrop farming and the lack of eco-friendly farming practices and is a target area to be conserved by a CA.¹⁰²⁴ If a proposed legal framework is applied exclusively in privately-owned land, Thailand will miss a chance in encouraging those farming on publicly-owned land to conserve this type of land. This thesis sees that a proposed legal framework should be applied in both privately-owned land and that belonging to the state but in the management of farmers or individuals. As this

¹⁰²² See the justification explained in sub-section 2.1.2 above.

¹⁰²³ See the problems and the potential use of CAs in the context of Thailand in section 1.2 of chapter 4.

¹⁰²⁴ See environmental impacts from intensive farming in Thailand in section 1.2 of chapter 4.

consideration is connected with the point concerning a burdened landholder, this thesis will consider this point in section 2.5 below.

2.5 Burdened landholders

Proposal:

The legal proposal should provide that landowners and others having the right over a certain plot of land (e.g. tenants) are eligible to enter into CAs with a qualified holder subject to the binding periods stipulated in section 2.7. CAs made by landowners run with the land and bind successors in land title, but CAs made by others persons having the rights on the property of another do not bind a future owner and are subject to the period of the rights over the burdened land.

The previous section laid down the rule that the qualified areas for the conservation can be either publicly-owned or privately-owned land. A further issue to be determined here entails the persons eligible to be bound in a CA (burdened landholders). This legal point entails the considerations about eligible persons entitled to enter into the agreement and the binding effect on successive landowners.

2.5.1 Eligible persons entitled to enter into the agreement

Persons who are eligible to make a CA with a qualified holder can be categorised into those who own or possess privately-owned land and those who have the right to farm on publicly-owned land.

For the first category, similar to the rules implemented in the comparator jurisdictions, a landowner is in the most appropriate position to enter into a CA with a qualified holder. In light of this rule, CAs created under a new statute should be made between a qualified holder and landowners, so long as such a person is indicated as a landowner or possessor in a land title deed or other comparable documents.¹⁰²⁵

¹⁰²⁵ This requirement should be made because the Thai law recognises the acquisition of ownership by prescription and other factual circumstances. This includes the situation where the land adjacent to a waterway expands due to *alluvion* (see CCC, ss 1308 and 1382). These circumstances recognise the ownership on land, but a person who seeks to claim the right over the land must apply for the issuance of a land title deed for the benefit of the full legal recognition. A person who fails to do so is unable to transfer ownership of such land to another (CCC, s 1299).

Apart from that, since privately-owned land might be under the possession by those who are not a landowner under leases for an extended period, it is worth examining here whether tenants or those holding property rights in the property of another (*jus in re aliena*) should be eligible to enter into CAs or not, apart from the landowner. This thesis proposes that these types of persons should be eligible to create a CA if the landowner grants consent for such participation. Two reasons can be made for this proposal. In the first place, as will be seen in section 2.7 regarding the legally binding period, a legal proposal regarding binding periods sets two divisions of CAs; comprising those running with the land in perpetuity and those with a specific period. A tenant should be eligible to enter into the latter type of agreement.¹⁰²⁶ The reason for this is because many agricultural land plots in the country are under both a short- and long-term lease contract,¹⁰²⁷ and the proportion of this type of land is considerably increasing. Without the legal provision enabling a land tenant to make a CA, this type of actor is unable to get involved directly. Also, without the provision allowing land tenants to enter into a CA with a qualified holder, landowners who have already leased their land may not want to enter into a CA for the land under the lease contract.¹⁰²⁸ Hence, a tenant should be entitled to make a CA with a holder with the permission of a landowner.¹⁰²⁹

Regarding the eligibility of farmers, who possess or farm on publicly-owned land, the database recognised by the Thai government reports that around 11 percent of the country's area (approximately 14 million acres) is publicly-owned land designated as agricultural land owned by the Agricultural Land Reform Office (ALRO).¹⁰³⁰ ALRO grants a right to farm on farmers holding their land without any limit in time, and this farming right can be transferred to their heirs who agree to farm on that land.¹⁰³¹ In reality, this type of agricultural land is possessed and used by farmers in a similar vein to the land under a lease contract. Therefore, the same reasoning should be applied in that a farmer who farms in this type of land should be eligible to enter into a CA.

¹⁰²⁶ See the advantages of setting a limited-term CA in section 2.7 below.

¹⁰²⁷ According to the statistics of the Office of Agricultural Economics published in 2018, the percentage of an agricultural land area under a lease agreement accounts for 19 percent of the farmland in Thailand (Office of Agricultural Economics (n 368) 169).

¹⁰²⁸ In the case where landowners who leased their land desire to enter into a CA themselves, see the general rule proposed in the above paragraph.

¹⁰²⁹ See the discussion about the legal binding effect of CAs made by a tenant in sub-section 2.5.2 below.

¹⁰³⁰ This type of land is designated by virtue of Agricultural Land Reform Act BE 2518 (1975).

¹⁰³¹ The right to farm is revoked where, among other grounds, the farmers who are granted the right to farm do not use that land for agricultural purposes.

However, as the ownership of this type of land is vested in ALRO, two conditions should be provided. First, the obligations to be created by a CA must not contradict the rules in utilising that land subject to the regulation regarding the use of agricultural land stipulated by ALRO. Second, CAs can be made only with the approval of ALRO.

2.5.2 Binding effect on successive landholders

One of the standard features of CAs is the ability to bind successive landowners who are not the ones who entered into the agreements. The point to be examined here is whether the legal proposal should provide this feature. This thesis considers this feature as an essential characteristic of CAs that needs to be emphasised by the authorising statute. This is because a private-law agreement made under the existing Thai law does not bind a third person.¹⁰³² Hence, a statutory agreement which does not follow the rule of the privity of the contract should provide an explicit provision about this legal feature.¹⁰³³ As seen from many CA-enabling laws in the UK and Australia, the provision establishing a CA commonly provides this feature, and this is also a key reason why a new mechanism is needed.

Another issue that should be made here is about the legally binding effect of a CA created by those possessing or holding specific property rights over the land of another. The example of these type of right holders include land tenants and farmers who have a right to farm on publicly-owned land. As analysed above, these persons are eligible to enter into CAs, but this thesis sees the importance of providing a specific condition regarding the binding effect for CAs made by this type of CA. The maximum binding period for this latter type of CA should last up to the period of a lease agreement or the length of a period of the right to farm. It means that CAs in this category could run with the land, and bind those being in the same position of those made CAs with a holder, for a limited period, subject to the conditions of holding the rights over the eligible land. This condition implies that if a qualified holder seeks to make a perpetual CA on a specific land plot, the qualified holder must enter into the agreement with a landowner to secure long-term conservation.

¹⁰³² A possible way of making a specific obligation to run with the land is to agree on establishing a property right, including the creation of servitude by agreement. However, a mere simple contract does not create an obligation running with the land.

¹⁰³³ In sum, the general rule of privity of contract recognises the legally binding effect of a contract between persons who make a contract and agree to be bound therein. The obligation of a contract does not bind third parties who do not accept to perform an obligation (Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 7 and 170).

2.6 Obligations

Proposal:

The legal proposal should provide a mere framework provision regarding CA obligations and leave room for prospective parties to consider what should be made as particular burdens. The provisional text should prescribe that CAs created between CA parties may impose both positive and negative burdens, e.g. obligations not to clear native vegetation and maintain the existing ones, subject to the conservation purposes stipulated by the law.

Having developed conclusions about burdened landholders, the nature and substantive content of CA obligations imposed on burdened landholders are discussed here. Obligations or burdens are an integral part of a private-law vehicle introduced to require specific persons to carry out activities on land. The examination in section 6.4 of chapter 5 illustrated different styles in providing substantive content of CA obligations. This section considers whether setting a provision with a loose approach stating that CA parties are free to set affirmative and negative obligations, subject to CA purpose set in section 2.3, is sufficient or not.

For the jurisdictions where a CA remains unknown, setting an illustrative list of possible obligations in the legal provision, makes it clear which specific tasks a CA can be used to achieve. Also, it could prevent ambiguity as to whether or not the activities or tasks proposed are within the CA purposes and obligations set as a prescriptive list under the law. However, the dangers for this approach could be that a prescriptive list of obligations laid down in a legislative framework could be outdated as it remains unknown whether environmental impacts from climate change would affect a fixed and prescriptive list of obligation.¹⁰³⁴ For these reasons, the normative content stipulated in a proposed CA-enabling law should not be too fixed or too broad. The provisional text found in various CA-enabling laws in chapter 5, which broadly prescribe that CAs may impose positive or negative burdens subject to the purposes of CA implementation stipulated under a CA-enabling law, looks desirable. This thesis

¹⁰³⁴ See the dangers of making a rigid legislative obligation in Owley and others (n 735) 730-34.

sees that the potential activities suitable for the conservation of natural features for Thailand can be both active and passive ones. Planting native trees for carbon sequestration and wildlife habitat is illustrative of the first, and refraining from the use of pesticides and agreeing not to change woodland to pastureland represent the latter. Many others also fall under these types of obligations.

As CA obligations are closely linked to the purpose for which a CA can be created, discussed in section 2.2, it is necessary to show how CA obligations are interrelated to the purpose of implementation. This thesis proposes a provisional test that the positive or negative obligations created by an individual CA must be able to achieve the conservation of natural features on land subject to the agreement between the parties and the provision about the conservation purposes.

2.7 Durations

Proposal:

The legal proposal should provide a provision regarding a default rule of a binding period. The legal proposal should provide that a default binding period of CA is a perpetual term, but the parties could agree to make a time-limited CA subject to the type of burdened landholder, as discussed and elaborated in section 2.5 above.

CA-enabling laws implemented in the comparator jurisdictions employ different approaches regarding the duration of CA. Although the majority of them set a default period to bind the land in perpetuity, some provide specific binding terms, and some do not set any specific provision about this legal matter.¹⁰³⁵ This section investigates whether and how Thailand should set a provision for this legal matter.

Although the duration should be subject to negotiation under a specific agreement, this thesis considers that providing a rule for a default period is necessary. This type of provision is advantageous for the interpretation where an individual CA has no clause about its binding period. From a law-maker's perspective, setting a default period indicates the legislative intent in enacting a CA-enabling law on whether the legislature seeks to introduce CAs to secure short or long-term conservation. For instance, if this

¹⁰³⁵ See this feature in section 7.4 of chapter 5.

provision sets a default binding term of CAs for five years, it is clear that a law-maker aims to use CAs for short-term conservation rather than long-term.

As mentioned above, the next point is whether a permanent CA or a time-limited CA should be made. This thesis considers the characteristics of land and land possessors in Thailand as crucial factors influencing the design of a CA binding period.¹⁰³⁶

Time-limited CAs may be necessary and should be available in Thailand due to the character of land use and the interconnection between burdened landholders and binding periods. To begin with, as noted in chapter 4,¹⁰³⁷ the average size of the parcel of land in Thailand per family is comparatively small compared with those in the comparator jurisdictions, and several parcels of land are under a lease between a landlord and farmer. Setting a default period of a CA to run in perpetuity may not be welcomed by all farmers or landowners in the country since they might be reluctant to become tied by or unable to enter into a permanent obligation, and this could exclude farmers who lease land from the participation in this legal scheme. For this reason, a time-limited CA similar to management agreements in the UK or wildlife refuge agreements in NSW should be available. Secondly, as discussed in section 2.5, persons who possess the land for a limited period, e.g. tenants, should be eligible to enter into CAs. The limited period of possessing the land of another means that the agreement they are entitled to make should be limited to the period of their right over such land with specific terms.¹⁰³⁸

Then, the point to be considered further would be the necessity of a perpetual CA. This thesis sees the necessity to introduce this type of CA alongside a fixed-term CA. As observed in chapters 4 and 5, a perpetual CA is advantageous in various respects and could conserve natural features for the common interest of people and nature in the long run. This type of CA might indeed look inflexible, but it is necessary for enabling some market-based instruments being implemented in the coming future, for instance, for the implementation of a carbon sequestration scheme under a REDD+ programme,

¹⁰³⁶ This includes the linkage with the considerations about eligible land and burdened landholders in sections 2.4 and 2.5 above.

¹⁰³⁷ See section 1.1 of chapter 4.

¹⁰³⁸ See the binding duration of CAs made by a tenant in sub-section 2.5.2 above.

as suggested in chapter 4¹⁰³⁹ and discussed further in chapter 5.¹⁰⁴⁰ Apart from that, a provision prescribing that a CA can be created to last in perpetuity could remain a common feature of this legal tool and help distinguish it from other agreements being created in the future. However, this type of agreement may be subject to conditions on modification and termination as will be examined in the next section.

2.8 Variation and termination

Proposal:

A provision dealing with CA variation and termination should be made. This provision should entitle CA parties to do this by agreement, and the court should have the power to decide the reasonable grounds of the modification and termination where disagreement on these grounds takes place. Bringing an action to the court by the public on such ground should be available for CAs subject to the conditions stipulated in 2.12.

The study in chapter 5 illustrates the existence of legal clauses relating to the variation or termination of CAs in most CA-enabling laws, coupled with their different conditions. This part considers whether the proposed CA-enabling law should provide a provision enabling a certain actor to vary or terminate a CA, and if so, what the provision should be.

This thesis considers that without this type of provision, CA parties are free to negotiate whether and how a CA should be varied or terminated. As seen in part 11 of chapter 5,¹⁰⁴¹ such a view might be inappropriate for a conservation tool seeking to serve the public interest, specifically where governments spend public funds to implement CAs. Lack of this kind of provision also constitutes a difficulty for a perpetual CA. In the case of a perpetual CA made to conserve wetlands, the possibility of drought resulting from climate change would make this implementation impossible. Setting the legal conditions on how this kind of CA can be varied or extinguished

¹⁰³⁹ See the problems and the potential use of CAs in the context of Thailand in section 1.2 of chapter 4.

¹⁰⁴⁰ See the summary on how the REDD+ scheme functions in Footnote 726 in section 7.4 of chapter 5.

¹⁰⁴¹ See sub-section 11.4.1 of chapter 5.

would be more sensible, but the grounds for variation or termination should be further considered as seen below.

Regarding the conditions for variation and termination, this thesis proposes a standard rule regarding the modification and termination of CAs based on the agreement between CA parties, but the court should be entitled to review such modification or termination where disagreement on these grounds takes place. This proposal does not follow the provisions established in some jurisdictions which confer on eligible holders the unilateral right to modify or terminate CAs. Such a unilateral right is disadvantageous as it makes a CA very similar to a direct regulatory tool, and this could demotivate a prospective landowner to enter into a CA with an unequal agreement. Thus, a possible way to balance the bargaining power between the parties is to entitle them to agree whether they want to change the condition or terminate the CA.

Apart from the standard rule above, this thesis sees the importance of public involvement in overseeing a CA in some situations. Specifically speaking, the public, including neighbouring landowners, should be entitled to bring a case to the court where CA parties agree to modify or terminate a CA in question. However, they should be entitled to do this where it meets specific conditions as will be elaborated in section 2.12 below. The justifications for this proposal are that in many cases, the variation or termination of CAs implemented by public money might be questioned by people or communities whether they serve the public interest. Such variation or termination should be subject to review by a court where there is no consensus between holders and burdened owners in a similar vein as conservation burdens under the Scottish legislation. The role of the court in this instance should entail whether the variation or termination is reasonable or not. The process and grounds for the review by the court established in the Scottish legislation are illustrative as to how a specific regulation can be developed to fulfil this provision.¹⁰⁴²

2.9 Enforcement for the breach of obligation

Proposal:

¹⁰⁴² See the role of the courts in the variation and termination of CAs in sections 11.2 and 11.3 of chapter 5.

The legal proposal should prescribe a civil law remedy as a primary means for CA enforcement. Civil remedies for enforcement should be the same as those applied for civil disputes. The third-party right of enforcement should be applied subject to the conditions elaborated in section 2.12 below.

It is also important to consider whether a CA-enabling law should provide a specific provision for enforcement where the breach of obligation arises. On the one hand, a CA is a private law instrument created by two parties. The private legal rules regarding the enforcement of obligations and the binding effect of property rights are already in place, and this seems sufficient to deal with the breach of obligations. On the other hand, a unique feature of CAs created to serve some public interest begs the question for Thailand whether a CA-enabling law developed for this country should provide any features to ensure their success in conserving natural features. This thesis sees that a CA-enabling law for Thailand should have a provision in this matter due to the nature of CAs which primarily seek to conserve features on land for the common benefit. This feature indicates the need to provide a specific enforcing measure to ensure the success of this aim and a specific measure for the enforcement as will be further elaborated below.

To develop a provision for CA enforcement, it is worth considering two questions. The first is whether the legal proposal should employ criminal and administrative tools to strengthen the enforcement to ensure the achievement of the aim of public interest enforcement. The second is whether the legal proposal should provide any specific feature for a civil law remedy to ensure the effectiveness of the enforcement if it is sufficient, and if so, what any specific features should be.

Regarding the necessity of criminal and administrative sanctions, the discussion in chapter 5 illustrates the use of these legal tools to enforce the breach of CA obligations. Although criminal offences and administrative sanctions have various strengths and play a vital part as the tools for environmental regulation,¹⁰⁴³ they might be unsuitable and unnecessary to incorporate them as part of CA-enabling law for three reasons. First, they could detract from the voluntary nature of CAs, and make a CA-enabling

¹⁰⁴³ See the strengths of the uses of criminal and administrative measures to regulate social behaviour at sub-section 2.1.3 of chapter 2.

law excessively complicated. Criminal and administrative sanctions could also engender the view towards this legal tool as a confrontational and bureaucratic instrument. Second, administrative and criminal sanctions are already in place as a default rule applied for the operation of public bodies under administrative and criminal laws where such bodies disobey to a specific criminal offence or fail to implement the law in accordance with administrative law. Assume that a certain public body entered into a CA with a landowner to devote the property as an open space, and this CA is supported in its implementation by public payments. Then, the public body and landowners dishonestly agree to terminate such a CA, leading to the loss of public payments and the extinguishment of the public space. Such a public body can be reviewed or prosecuted under the general rules of criminal law and administrative law. Third, a civil law remedy, as a default rule for the enforcement, can be sufficient where it is well-established as will be seen below.

Regarding civil law remedies, there are various tools in place to enforce a person who violates obligations created by parties. This thesis considers that civil remedies available under the existing regime are sufficient to deal with the breach of obligation. For instance, where a burdened landholder failed to fulfil the tasks, a holder is entitled to bring an action to the court to seek for injunctions, damages or any other compensation. However, the suitability and practicability of existing civil remedies and procedures for CA implementation and enforcement has not been fully studied, which means that they might be inefficient or ineffective in practice. This consideration should be one of the issues for further research.

Another point worthy of discussion is whether non-parties should be entitled to bring an action to the court. As the consideration is closely linked to the point about public oversight to be discussed in section 2.12, this point will be examined this point later.

2.10 Incentives

Proposal:

The legal proposal should prescribe the provision of incentives for entering into a CA with broad language. The provision could enunciate that a holder ‘may offer’ some incentives in exchange for entry into a CA subject to the conditions under this law.

The details in providing what incentives can be made available to landowners should be prescribed in a further regulation.

The consideration of incentives used for attracting a prospective landowner to enter into a CA should be considered in two aspects. The first is whether a proposed framework should address this consideration as part of the legal proposal or not. The latter is in cases where it is to be included as a CA provision, what the legal content should be.

As seen from the examination in chapter 5, a provision about incentives does not appear in all CA-enabling laws,¹⁰⁴⁴ and the absence of this legal matter does not affect the validity of a CA created between two parties. These grounds could be used to exclude an unnecessary matter from the legal proposal to avoid the complexity of a new legal framework. However, including this legal matter may look more attractive than having no provision to induce participation by landowners¹⁰⁴⁵ as justified below.

This thesis sees that there are more advantages in providing this legal provision, but the language used to offer the incentive should be flexible. This type of provision makes the legal proposal attractive, increasing the motivation of landowners to enter into the agreement. In the first place, the legal proposal should be a legal innovation coming with an exciting option to encourage individuals to follow practices beyond the minimum requirements under the existing law. Thailand, as a developing country, is unlike the comparator countries in that its average parcel of land per family is relatively small as seen in chapter 4. It means that where a government seeks to restrict land use patterns or imposes new positive burdens, the yields from such land may substantially decrease. Without a provision about the incentives available in exchange for participation, a CA may not be an attractive choice. Secondly, incentives are one option in responding to the economic injustices that might be perceived when agreements are entered.¹⁰⁴⁶ These can arise either because the owners entering agreements are no longer able to use their land to optimise their profit from it or

¹⁰⁴⁴ The provision about incentives awarded for participating landowners mainly appears in Australian legislation and management agreement-authorising laws in the UK. See sections 9.1-9.3 of chapter 5.

¹⁰⁴⁵ The report studying the implementation of CAs in European countries emphasised that including a provision regarding the use of incentives in the law authorising the creation of CAs could be very important to encourage the use of this legal tool. See Racinska and Vahtrus (n 61) 35.

¹⁰⁴⁶ See the merits of incentives in sub-section 2.1.2.2 of chapter 2.

because while some owners agree to limitations, others who are not subject to restrictions still benefit from the wider environmental improvements that flow from these agreements (the ‘free-rider’ problem).¹⁰⁴⁷

A possible way for elaborating this type of consideration could be that a CA-enabling law may offer some sorts of incentive for the participation to induce the entry into a CA by a landowner. This enables the governments to initiate a CA for conserving features on land where the funding is available. Apart from that, the phrase ‘may offer some sorts of incentive’ does not mean that the government must provide incentives for every participating landowner, and the agreement can also be made without any incentives subject to the agreement between CA parties.

Regarding a possible kind of incentive and granting conditions, a proposed provision may employ inclusive language by providing that a holder may offer a burdened landholder a financial benefit, including payments and tax benefits, or technical assistance subject to the availability of such assistance. The conditions for offering such technical or financial assistance may be subject to the details stipulated by specific regulations. For example, the regulations may prescribe that financial benefit supported by a specific scheme should be available for a perpetual agreement, which is registered, or be available where the government, as a qualified holder, has a specific scheme ready for giving payments for CA participators.

2.11 Registration of CAs

Proposal:

The legal proposal should lay down the requirement of the registration of CAs. The law should provide that the creation of a CA will be valid where a landowner registers the acquisition of CA burdens in the land title document subject to the rules prescribed in a regulation. This provision is also required where the parties modify or terminate CAs.

¹⁰⁴⁷ This problem could happen where the land in a particular area is under a CA implemented for conserving vegetation and native wildlife, and fulfilling this conservation obligation increases the population of bees which help all farmers in that area to pollinate crops and fruits on agricultural land. On how bees can help farmers in pollinating their crops (see Bee Farmers Association, ‘Improving Profits through Pollination: A guide for farmers and growers’ <www.nfuonline.com/bfa-pollination-leaflet-bee-keepers-july-2016/> accessed 14 May 2020). See the limitation of voluntary agreements in sub-section 5.3.2 of chapter 3.

As mentioned in section 1.2 above, the legal mechanisms which create encumbrances running with the land are under the property law regime. This regime sets a fundamental rule regarding the acquisition of the real rights by requiring the registration of such acquisition on a land title document.¹⁰⁴⁸ Based on this requirement, the registration of CAs becomes a precondition of making a CA burden run with the land.

The first question to be discussed here is ‘should the proposal specify this requirement as a legal provision?’ This thesis sees that the proposal should explicitly state this requirement as one of its legal provisions. Without the requirement of the registration of CAs, it remains unclear and debatable whether and when a CA will become fully valid and bind the burdened land. Most, if not all, of the Thai laws creating a new property right set a provision requiring the registration when such a property right is acquired.¹⁰⁴⁹

Another point to be determined is who should be obligated to register a CA and how this process can be done. A general rule of land registration under the Thai law is that a person named as a landowner in a land deed is entitled to transfer the land or create encumbrances thereon. Hence, a landowner is in the position to be entitled to register the creation of CA on a land deed. This indicates that a landowner should be in a position to consent and be responsible for registering the creation of CAs.¹⁰⁵⁰ This should be applied both where either a landowner or tenant makes a CA.

It is possible that imposing this legal obligation on a landowner may create the opportunity for the owner to escape the long-term nature of the land (and its burden for successors) by not registering the agreement. Hence, a law-maker might induce landowners to register a CA by introducing the requirement that any incentives are available only once registered, as suggested in section 2.10 above. Apart from that,

¹⁰⁴⁸ See ccc, s 1299, which stipulates the condition for the acquisition of any property rights in real property of registering such acquisition. The failure to register such acquisition results in the invalidity of the acquisition and merely creates a contractual obligation.

¹⁰⁴⁹ For example, Right Over Leasehold Asset Act BE 2562 (2019)- the recent legislation establishing a new property right on real property- requires that the acquisition of this right is valid where such acquisition has been registered on a title document (ss 4 and 5).

¹⁰⁵⁰ By considering this rule, if a qualified holder agrees on a CA with a tenant for the lifetime of the tenancy, but a landowner opposes this, the owner may be entitled not to register the land to be under CA obligations.

this thesis will discuss whether a holder should be eligible to register a CA in the following paragraph to fill the gap of such an undesired circumstance.

The governing rule of publicly-owned land on which the law grants the right to farm to the individuals under the Agricultural Land Reform Act BE 2518 (1975) is similar to that of privately-owned land discussed above. This legislation treats the Agricultural Land Reform Office (ALRO) as an owner of this type of land, and ALRO is entitled to register the farmland being under a CA.¹⁰⁵¹ It means that ALRO should be involved in giving the consent where a farmer who has the right to farm seeks to enter into a CA with a qualified holder. This is similar to a case where a tenant wants to enter into a CA by the approval and consent of a landowner.

Although the default duty in registering the land subject to a CA should be bestowed on a landowner, it might be possible that some landowners may be reluctant to register a CA, deliberately entered into by them. Some might argue that a special rule entitling a holder to register a CA or to bring the case to the court to resolve this difficulty should be made. This thesis views that a default rule of private law is sufficient. This is because a contractual obligation arising from a CA, before it is registered, already arose. This obligation obligates a landowner, who agreed to bind in a CA, to register a CA. Where a landowner fails to fulfill this obligation, a holder is entitled to bring the case to the court for asking the permission to register a CA by a court verdict.

Apart from that, it is worth examining what the legal effect of the registration is. Most CA-enabling laws examined in the previous chapter employ a similar provision that CA registration is a pre-condition enabling CAs to run with the land. It is interpreted that unregistered CAs merely constitute a contractual obligation. This thesis supports the provision requiring the registration of CAs and stipulating the legal effect of the registration as similar to those found in other jurisdictions. Above all, as the alterations of CA burdens by means of variation or termination affect the existence of burdens which run with the land, it is also necessary to provide that the change of conditions in implementing CAs should also be made by the same requirement for registration to enable the third parties to notice the change regarding the burdened property.

A further consideration is about the necessity for the establishment of a system to make information available. Undeniably, this mechanism is crucial for supporting public

¹⁰⁵¹ Agricultural Land Reform Act BE 2518 (1975), ss 36 *bis* and 38.

transparency and accountability of CAs created for serving the benefit for people in society. Nonetheless, at this stage of the development of this legal proposal, it remains unclear which public authority will take responsibility for the implementation. This would be problematic if a legal proposal required the establishment of a system for the compilation of CA related-information without knowing what might be the obstacles for the establishment of this system. Thus, this research considers whether and how the system for gathering CA-related information and making it available to the public should be an administrative matter. If this proposal is put forward, the government should decide the details on how this type of system should be established.

2.12 Public oversight

Proposal:

Measures available for public oversight are in place under the established regime of administrative law. This legal regime entitles the public to file an administrative case to the court where the rights recognised for the public are violated. This thesis sees that this is sufficient to allow the public to participate in CA governance. Hence, it is unnecessary to provide an additional rule for public oversight.

As mentioned at the beginning, since a CA is a private legal tool seeking to serve the public interest by conserving some features on land, this begs the question ‘should the proposal for Thailand provide any measures to oversee the implementation and enforcement of CAs?’ The examination in the previous chapter reveals the fragmentation of the employment of oversight measures by non-parties in the comparator jurisdictions.¹⁰⁵²

Public oversight¹⁰⁵³ has both benefits and drawbacks. It can be an opportunity for the public to participate in the conservation of privately-owned land. At the same time, imposing an excessive level of the oversight by the public could detract the nature of

¹⁰⁵² See this characteristic in sections 12.1-12.3 of chapter 5.

¹⁰⁵³ As justified in part 12 of chapter 5, the term ‘public oversight’ is used in two respects. The one is used for the actions or processes where non-CA parties are required or empowered to get involved. It reflects public oversight in the sense of public participation in environmental matters. Another respect covers the circumstances where burdened landholders or holders are supervised or controlled by public bodies to ensure that a CA will be implemented and enforced correctly (public oversight via public bodies).

a private-law mechanism and demotivate prospective landowners to come into play. The view towards the question set above is that public oversight should be introduced if the public is unable to participate through the existing mechanisms.

This thesis considers that the designation of a qualified holder from public bodies is sufficient to provide the oversight by governmental bodies. Additionally, the existing regime regarding the review of administrative action by the court is in place; and it supports oversight by the public. Setting an additional rule for oversight might be seen as overregulation, and brings complexity to CA governance.

The designation of public bodies to be a qualified holder implies that the information in the hand of the holder is public information. This makes the public able to access such information subject to the law on public information. In Thailand, the right of access to information is expressly recognised under Official Information Act BE 2540 (1997). The legislation requires state agencies to disclose any information considered as ‘official information’. If CAs were to be implemented in Thailand, information relating to each CA under the control or possession of a holder could be accessed by the public subject to the conditions under this Act.¹⁰⁵⁴ Apart from that, as the act of creating a CA by a designated public body (a qualified holder) under a new legal proposal is an administrative action *per se*, the Thai court can review it according to the condition under the Thai administrative legislation.¹⁰⁵⁵ The public may be entitled to bring such a case against a holder to administrative courts for judicial review under the established regime of administrative law. According to the rules under the existing laws, administrative courts would be competent to adjudicate these following cases. The first can be those where a holder agrees to modify or terminate a CA without or beyond the scope of powers and duties or in a manner inconsistent with the law. The second can be those where a holder neglects its duty to enforce a burdened landholder where such a person breaches a CA obligation. However, persons seeking to file such a case must demonstrate whether and how they are affected by such unlawful action. This means that the measures allowing the public to participate in CA oversight are already in place, and there is no need to establish any additional rules for oversight by the public.

¹⁰⁵⁴ Official Information Act BE 2540 (1997), ss 4, 9, 14 and 15.

¹⁰⁵⁵ See Act on Establishment of Administrative Courts and Administrative Court Procedure BE 2542 (1999) and Administrative Procedure Act BE 2539 (1996).

2.13 Legal form, applicable term and means of creation

Proposal:

A proposed CA-enabling law should employ the term ‘conservation agreement’.

The consideration of what specific name should be used for CAs in the context of Thailand is linked to its legal form and the means of creation. The examination in the previous chapter illustrated various conservation tools, which fall under the meaning of ‘conservation agreement’. Also, it indicates some linkage between the applicable terms used in each comparator jurisdictions and how CAs are made.¹⁰⁵⁶ The question here is what term should be employed for the name of CAs under the legal proposal.

This investigation could start from the determination of what legal vehicles are in place under the traditional rule of private law. The terms ‘agreement’ and ‘servitude’ are the most familiar words employed in the Thai legal system.¹⁰⁵⁷ The first could reflect the legal method of creating this legal scheme while the second indicates the legal effect of this legal tool after it is created that it constitutes a new property right running with the land.

The use of the term ‘conservation servitude’ looks appropriate, where it is considered from the property law perspective. It helps to emphasise the character of a legal tool creating burdens running with the land. This may seem more appropriate than the use of ‘agreement’ which could mislead Thai lawyers that it merely creates a contractual obligation.

Nonetheless, this thesis argues that the word ‘agreement’ is more appropriate than the word ‘servitude’ in combining with the word ‘conservation’ for various reasons. First, the CAs being proposed for the Thai legal system have special features different from the traditional rules for servitudes, as explained in sub-section 1.1.1 above. These include the ability of CAs to impose both positive and negative burdens and with no requirement of having a benefited property. Using the term ‘servitude’ may not be fit

¹⁰⁵⁶ See section 1.4 of chapter 5.

¹⁰⁵⁷ This study does not consider the appropriateness of the use of the term ‘covenant’ and ‘easement’ as these terms do not appear in the Thai legal system and the employment of either of them would give rise to some confusion as to how they can operate with the existing regime of private law.

with the new features coming with this new legal tool. Second, the word ‘servitude’ may not reflect the legal character of a voluntary instrument, but the word ‘agreement’ serves this task. It is true that a general agreement merely creates a contractual obligation. This is not the case for ‘conservation agreement’, as a statutory vehicle in which the law authorising its creation may add a specific feature of the ability in imposing burdens running with the land similar to CAs in place in Australia which contain this legal feature. Third, Thai lawyers and courts are familiar with a legal tool developed from the law of contract rather than that of property law.¹⁰⁵⁸ Naming a CA as a ‘conservation agreement,’ which refers to a contract creating restrictions or positive obligation over the land looks more appropriate.¹⁰⁵⁹ Fourth, the use of the term ‘conservation agreement’ indicates itself that a primary means of creation of CAs is by agreement between eligible parties. There is no need to provide additional provision regarding the means of creation as it can employ the default rules of contract law in formulating CAs.

2.14 Compatibility with existing relevant conservation tools and laws

Proposal:

A proposed CA-enabling law should have a provision declaring that the implementation of a CA on certain land does not overrule or exclude the duties required under specific rules under existing laws. The new legal proposal should be annexed as part of nature conservation laws.

As the coming of the new law entails restrictions on the use of land for conservation ends, the implementation of a new scheme brings some new features to the legal rules of land-use regulation and nature conservation law. Hence, consideration regarding the compatibility between the proposal of CA-provisions and the existing laws, based on

¹⁰⁵⁸ For example, Thai lawyers prefer to sign a long-term lease contract rather than to establish superficies by a contract over the land.

¹⁰⁵⁹ Similar to the rationale for the use of the word ‘conservation easement’ in UCEA, the National Conference of Commissioners on Uniform State Laws embraced the term ‘easement’ rather than that of ‘restrictive covenants’ and ‘equitable servitudes’ because the legal concept of easements was most comfortable for lawyers and courts in the USA (see National Conference of Commissioners on Uniform State Laws (n 512) 1-2).

C&C regulation, should be made to justify how the new proposal can be consistent with the established laws.

This section discusses the considerations on how to provide for the new tool working along with the existing ones,¹⁰⁶⁰ and to what type of law the CA-enabling provisions should be attached. For the first consideration, this study considers the primary intention of a new law as a tool to support landowners to perform conservation practices beyond minimum duties under the existing regime of land-use and nature conservation laws. Thus, the obligations created by CAs will not overrule the duties under the existing laws, but rather seek to introduce a subsidiary option working alongside the existing rules. The question to be examined is whether a new framework should set a provision recognising the interaction between the existing regulatory measures and a proposed legal framework or not.

To date, there is no voluntary legal mechanism operating alongside land-use and nature conservation laws in Thailand. The introduction of this new legal instrument running with no provision identifying how the new tool will work along with the current ones could create ambiguity over how they interact with each other. Additionally, it could also give rise to the question of whether the implementation of obligations under the new legal tool overrides any existing legal rules or not. For these reasons, it is necessary to prescribe how the new CA-enabling framework could operate to avoid misunderstanding about the functionality of CAs in the legal regime of land-use and nature conservation.

A further question is ‘what should be a provision recognising the compatibility of CAs and the existing regime?’ A possible provision could recognise that the purpose of the implementation of a CA is to impose burdens on a burdened landholder to carry out agreed activities beyond the minimum legal requirement of land-use and nature conservation laws. This notion implies that CAs impose additional duties on a voluntary basis on participants, and such duties are those unregulated by the existing regime. This means that where a specific piece of property is under a CA, and then it is granted a mining licence or designated as a nature reserved area, the implementation of CAs could be terminated.

¹⁰⁶⁰ See the justification why a voluntary-based tool should not operate independently as a substitute for C&C regulatory tools in Godden, Peel and McDonald (n 17) 255-6.

As discussed in section 13.4 of the previous chapter, although the implementation of a CA cannot prevent the land from being exploited by a mining operation, it is because of its nature as a private legal tool and the fact that one property right is unable to overrule others recognised under other laws.¹⁰⁶¹ In reality, as observed by Reid, the conservation of nature is neither the only concern of the state nor necessarily high in the list of priorities.¹⁰⁶² It means that, for instance, if the governments prioritise the conservation of some feature on land over activities detrimental to ecological features on such land, e.g. mining operations, they should impose other stronger public regulatory tools instead of the use of CAs. These include the declaration of compulsory purchase of such land and designating it as a specific nature reserve area.¹⁰⁶³

Regarding the dependency of a proposed CA-enabling law, the examination in the previous chapter shows that all CA-enabling laws are not created as self-standing legislation, but rather attached as part of certain types of legislation, including land law and laws relating to nature conservation. This study considers that a proposed legal framework should be attached to the law of nature conservation rather than the law of property (land law) or introduced as independent legislation. The reason against the establishment of this CA-enabling law as an independent regime is the need to avoid the complexity of the governing regime. If the legal proposal is enacted as an independent law, it is necessary to set a new governmental body to implement the law and designate a qualified holder which may require more public finance for this fulfilment than the attachment of the legal proposal to an existing law.

Above all, at least two reasons support the appropriateness of incorporating the new law as part of the law of nature conservation. First, the aim of implementing this legal tool, as determined in section 2.2, is to encourage the conservation of natural features on land to promote biodiversity conservation. This primary objective provides a strong fit well with the attachment to the law of nature conservation rather than property law. Second, all nature conservation-related legislation in Thailand already provides a governing body and legal mechanisms for its implementation. The inclusion of this

¹⁰⁶¹ Unless the law authorising the creation of property rights expressly prescribes that one may prevail over another as seen from a servitude which could impose restrictions over ownership on certain property (servient property).

¹⁰⁶² Reid, *Nature Conservation Law* (n 35) para 1.1.2.

¹⁰⁶³ As most of the land eligible to establish nature reserve areas in Thai laws must be publicly-owned land, compulsory purchase of the land on environmental grounds is required before the designation of the land as a nature reserve.

legal scheme as part of the existing nature conservation laws has no need to establish a new governing body. Third, this approach could also help justify how the new legal tool can work alongside the existing rules of nature conservation law. This approach could also support the work of a new voluntary tool consistent and coherent with other C&C conservation measures in place.¹⁰⁶⁴

3. Overall strengths and weaknesses of the legal proposal for Thailand

Although the previous part analysed and suggested what the legal provisions developed for Thailand should be, this study does not claim that the legal proposal is necessarily the most appropriate model for Thailand. In contrast, some weaknesses remain due to various factors, including the limited scope of this study¹⁰⁶⁵ and the necessity to implement the proposal in practice to evaluate what the limitations could be.¹⁰⁶⁶ As justified at the study aim, this thesis aims at being a pilot study examining and proposing a possible legal model developed upon a comparative analysis of law and doctrinal legal research. The overall strengths and weaknesses of this proposal considered from a legal aspect can be determined as explained below.

3.1 Overall strengths

The most crucial strength of the proposed CA-enabling law is the establishment of a legal vehicle recognising the legal status and binding effect of conservation agreements as the existing laws have several limitations in serving this task.¹⁰⁶⁷ This proposed law also enables landowners and the public to play a part in the law relating to nature conservation based on a voluntary basis, which has never been established in nature conservation law in Thailand. This legal proposal which creates the framework provisions can also be implemented to solve critical environmental problems on land, as observed in section 1.2 of chapter 2, as well as to convey some specific market-

¹⁰⁶⁴ See the argument made in the last paragraph of sub-section 13.4.1 of chapter 5. See also Reid, 'The Privatisation of Biodiversity?' (n 493) 223-5.

¹⁰⁶⁵ The limits of this study include the length of a PhD thesis and the methodology employed for this study. See further illustration in part 2 of chapter 7.

¹⁰⁶⁶ See further explanation regarding this research limitation in part 2 of chapter 7.

¹⁰⁶⁷ For instance, Grinlinton argues that a traditional rule of property law merely provides the rule for recognising property rights and the exercising of such rights. This is different from environmental law which mainly deals with the exercise of property rights on communities (Grinlinton (n 6) 391-2).

based schemes for nature conservation.¹⁰⁶⁸ These include the implementation of the REDD+ scheme which entails planting and retaining trees for carbon sequestration. The implementation of this proposal could also bring environmental governance with the public into play, which moves away from environmental governance by government.¹⁰⁶⁹

3.2 Overall weaknesses

Although this conservation scheme could bring about several positive effects on the enhancement of environmental governance for the country, some limitations may exist and should be addressed here.

From an environmental governance perspective, the legal model proposed has not substantially moved away from governmental regulation as the qualified holder is a designated governmental body as laid down in section 2.3 above, and the public has a limited role in participation under this legal proposal.¹⁰⁷⁰ Arguably, the proposed CA framework provides more effective roles for landowners than the legal measures in the existing legal laws.

From the equality of parties perspective, the government body is entitled to consider when this legal scheme should be implemented under specified conditions, and decide whether CAs supported by public funds should be modified and terminated, and thus there is some inequality of bargaining power between CA parties.

Another limitation can be about the effectiveness of implementing this tool. This legal scheme is created to primarily for use on land where it is possible to identify an owner by a land title document. This prevents its implementation for the conservation of marine or water areas. The limitation arising from the nature of a private law

¹⁰⁶⁸ See the problems and the potential use of CAs in the context of Thailand in section 1.2 of chapter 4.

¹⁰⁶⁹ Gunningham and Holley recently argued that the trend of environmental regulation is moving from a mere reliance on law and regulation, where state bodies are the central player, towards a new paradigm of environmental governance with multiple players (Gunningham and Holley (n 168) 2-3; Cameron Holley and Neil Gunningham, 'Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?' 2011) 24 New Zealand Universities Law Review 309, 335).

¹⁰⁷⁰ The example of CAs as a significant move away from environmental governance dominated by public bodies can be observed from the legal model implemented in the USA, where non-governmental bodies play a significant role in land conservation by this legal tool. See this illustration in section 4.3 of chapter 5.

instrument also hinders the use of this tool to overrule other public regulatory frameworks, which include the inability to prevent damage from mining projects.

Apart from that, some might have a question about the risk that the voluntary approach suggested will be used as a means of avoiding more stringent command regulation. CAs might be, in practice, not only equally difficult to enforce, but also potentially an excuse for lack of further action.

As observed in chapter 1, this thesis sets the scope of the study as arguing for the use of CAs alongside C&C regulation for two reasons. First, CAs should be an “alternative and subsidiary” tool of C&C regulation. This focus means that the thesis has no intention to discuss whether CAs will be better than the existing C&C regulation. Second, the focus mentioned in the first reason indicates that the thesis has no intention to compare the effectiveness or efficiency of these two regulatory techniques due to the limit of the research approach employed.

Regarding the difficulty in enforcing CAs, this thesis takes the view that, from a theoretical and Thai-law perspective, the enforcement of CAs is less rigidly constrained and therefore potentially more effective than that of C&C for two reasons. First, as seen from the Thai legal proposal in sections 2.8 and 2.12 above, there could be various actors entitled to enforce CA obligations, not just a responsible governmental body. The sanctions for non-compliance with CAs involve a lower level of legal coercion than that of C&C because the primary sanction is civil remedies. This kind of sanction is more flexible in that although a landowner is failing to fulfil CA obligations, CA parties can negotiate on how to solve the problem. Apart from that, the very nature of a voluntary agreement means that a current burdened landowner enters into CA voluntarily. The landowner has a choice to decide during a negotiation process to choose a remedy for non-compliance and the binding duration. The future landowners may be bound involuntarily, but when they come to be bound, they can negotiate whether to vary or terminate the agreement. These features are different from those of C&C regulation where the law already provides the measures for enforcement, and they are unable to change.

4. Conclusion

The examination in this chapter demonstrates the possibility of introducing a new proposal for the establishment of a CA legal framework in Thailand. This chapter uncovers some opportunities in developing such the new legal proposal, as well as identifies the limitations of the use of the existing laws to create CAs. Then, this chapter elaborated the thirteen possible provisions necessary for the establishment of this legal tool by drawing from the comparative analysis study in chapter 5. Although a number of weaknesses remains, this study affirms that the proposal has various strengths, which prevail over those imperfect points, but further research to make it ready for the implementation is desirable. The points suggesting the limits of the whole research and room for further study will be pointed out in chapter 7.

Chapter 7 Conclusion

Introduction

This thesis mainly aimed to explore the room to develop a legal scheme enabling the implementation of CAs in Thailand. It explored the potential value and applicability of CAs implemented elsewhere by employing doctrinal and comparative analysis. Then, it has developed a legal proposal for the establishment of this conservation technique in Thailand.

As observed in chapter 1, this thesis set the grounds for this study by reflecting that the existing environmental law of many jurisdictions globally is reliant on C&C regulation, which has some limitations. It subsequently set the scene for the examination of the use of CAs, a voluntary conservation tool, in combination with mainstream C&C regulation, as one of the policy options to conserve natural features on land. Also, it made an argument that it is worth considering whether and how this conservation option can be established in Thailand.

This thesis developed the main research question by posing ‘whether a legal framework for the establishment of conservation agreements should be made for the conservation of natural features on land? And if it should, what provisions should be made for the establishment of CAs to work alongside existing laws for nature conservation on land?’

The hypothesis was that it is possible to establish a legal model for the creation of CAs to work alongside the existing legal measures. The provisions constituting such a legal framework can be developed by means of comparative analysis of the legal features of CA-enabling laws implemented in the comparator jurisdictions and formulating a legal framework for Thailand. However, some further studies would be needed to move from a general idea to work out the precise details of a fully worked up proposal and assess its value in specific contexts.

The comparative and doctrinal analysis methods were used to examine the sufficiency of Thai laws and compare CA-enabling laws of the comparator jurisdictions. The choice of comparator jurisdictions was justified and focused on the laws implemented in Australia, the UK and USA, the jurisdictions where CAs have been implemented

for decades, and there is an abundance of information and analysis useful for discussion in this comparative study.

The thesis is divided into seven chapters. The theoretical concepts of environmental regulation and voluntary agreements were studied in chapters 2 and 3. The legal aspect of Thai laws was examined in chapter 4. A comparative study was elaborated in chapter 5. Then, chapter 6 took the findings drawn from the previous chapters to formulate the legal proposal for a CA-enabling law for Thailand and noted some strengths and weaknesses. The research findings of each chapter are summarised below.

1. Thesis findings

In light of the research questions set at the beginning,¹⁰⁷¹ findings are summarised into four aspects. They comprise 1) the theoretical concepts of environmental regulation and voluntary agreements; 2) the factual situation and relevant laws in Thailand; 3) the application of CAs in the comparator jurisdictions, and 4) the legal proposal for a CA-enabling law for Thailand.

1.1 The theoretical concepts of environmental regulation and voluntary agreements

The investigation in chapters 2 and 3 provided conceptual ideas on how the concepts of environmental regulation and voluntary agreements underpin the relevant laws of Thailand and those authorising the creation of CAs in the comparator jurisdictions. Such conceptual ideas enabled this thesis to consider the laws to be compared and developed in chapters 4 to 6 from the theoretical and regulatory points of view.

The investigation in chapter 2 revealed that the use of law to intervene in social behaviour could be regarded as a form of regulation. Such legal intervention may be rooted in various grounds, including regulating social activities for the public interest based on economic, social or environmental rationales. It highlighted that the law should be implemented to serve the public interest. Another important point highlighted in this chapter is about the styles and tools for environmental regulation.

¹⁰⁷¹ See the sub-research questions posed in part 2 of chapter 1.

C&C and self-regulation are the regulatory styles representing the regulatory character of the laws regarding land-use control, nature conservation and those enabling the creation of CAs. This chapter revealed that the initiation of regulatory tools based on a voluntary basis (self-regulation) is an option allowing firms and individuals to participate in a regulatory scheme. Various tools exemplified in this chapter are influenced or based on C&C regulation and self-regulation. They present different roles, levels of legal intrusion and governmental intervention, according to the laws establishing them. Those tools illustrated the diversity of options that can be implemented to work together, and voluntary agreements are one of the tools operating as part of the regulatory landscape. Chapter 2 argued that the understanding of the above concepts helps understand the application of voluntary agreements. It demonstrated how the concepts of regulation, specifically environmental regulation, lie behind and take part in shaping the current laws in Thailand and those of the comparator jurisdictions. Beyond that, the last section of this chapter argued that voluntary environmental agreements are desirable where law-makers seek to introduce a low coercive tool to encourage the conservation of features on land. This point was subsequently elaborated in chapter 3.

Further regulatory and theoretical aspects were investigated in chapter 3. This chapter narrowed down the discussion to examine the concept of voluntary environmental agreements (VEAs). This chapter set a starting point by arguing that CAs are a subset of voluntary environmental agreements. Hence, there is room to observe CAs from theoretical and regulatory perspectives through the examination of voluntary environmental agreements.

The observation from this chapter revealed various aspects of VEAs, including their definition, origination, typology, potential use, matters to be taken into account where VEAs are to be introduced. The investigation in these points led to the conclusion that the study of VEAs is advantageous in various aspects, but careful considerations of how a particular VEA can be implemented, and what their limitations can be, are vital. This chapter illustrated various connections, differences and similarities between the concepts of VEAs and CAs.

1.2 The factual situation and relevant laws in Thailand

Chapter 4 illustrated key existing problems and gaps, motivations for reform, and legal principles, which are relevant or support the creation of CAs in the Thai context. It revealed the shortcomings of the existing relevant laws in dealing with environmental problems arising from human activities on land. It also made a core argument that the understanding of factual and legal backgrounds is fundamental to the development of new legal innovation to tackle the problems which are happening.

Regarding the factual aspects of land use and environmental issues arising thereon, this thesis uncovered how land-use activities are interrelated to some environmental problems. The diversity and complexity of environmental problems posed by human activities on land indicate the room to improve agricultural practices to serve the conservation of nature. There is a need to regulate conservation practices on privately-owned land by a less intrusive legal tool. This part also exemplified the situations where CAs could be made to deal with those environmental problems.

The findings from the legal aspect indicate what relevant laws are in place. It showed that several laws in Thailand provide rules about land status, land rights, and providing rules regarding land-use regulation and nature conservation. However, none of them authorises the creation of CAs, which impose burdens running with the land. The majority of relevant laws are reliant on C&C regulation, which reflects the absence of the use of a voluntary approach to conserve natural features on land. The examination of these two aspects indicates the possibility of developing a new legal tool to work alongside the established laws.

1.3 The application of CAs in the comparator jurisdictions

The comparative study, which was conducted in chapter 5, provided comprehensive work comparing the features, strengths and weaknesses of CAs used in the UK, USA and Australia. It showed that the theoretical concepts of regulation and voluntary agreements examined in chapters 2 and 3 are an integral part of CA-enabling laws in those jurisdictions.

The comparative study uncovered the standard features of the law across different jurisdictions and identified key strengths and weaknesses or legal implications of each legal model. The findings from this chapter become baseline information guiding how

Thailand should develop its legal model by drawing the legal features from the comparison in this chapter.

This thesis separated thirteen critical elements regarding CA provisions to explore similarities and differences of the CA-enabling laws. This chapter established three grounds justifying why those elements should be investigated and discussed. The first is the categorisation in light of the definition of CAs given by the Law Commission, summarised in chapter 1, as well as the matters to be taken into account in creating VEAs, investigated in chapter 3.¹⁰⁷² The second comes from considering the aim of this study, which seeks to introduce CAs to work alongside C&C regulatory measures and the existing legal tools in place in Thailand, as examined in chapters 2, 3 and 4. The last one is by taking the common elements in place in the comparator jurisdictions into account.

The examination of each element revealed various issues vital to the development of the legal proposal for Thailand in chapter 6. For example, it illustrated that CAs in place in the USA could be used to conserve or manage both natural and cultural heritage. However, those implemented in Australia are exclusively used to conserve natural features. Such differences expose the strengths and weaknesses of each legal model, and what should be followed by Thailand.

Apart from that, this chapter revealed that, although being a voluntary tool in nature, its function as a subsidiary regulatory tool makes this tool interact with C&C regulation in many respects. Hence, chapter 5 noted that the development of new law for Thailand should consider how to make a proposed CA work alongside conventional direct regulation.

1.4 The legal proposal of CA-enabling law for Thailand

Chapter 6 made a contribution to this thesis by proposing a new legal framework operating on a voluntary basis of private law. The earlier part of this chapter revealed some opportunities in introducing CA-enabling laws, as well as demonstrated what the shortcoming of the existing laws in enabling the creation of a voluntary tool.

¹⁰⁷² See part 6 of chapter 1 and part 5 of chapter 3.

In light of the legal considerations and detailed discussions made in chapter 5, these following concluding remarks were elaborated as the legal proposals for the recognition of CAs in the Thai legal system.¹⁰⁷³

1) The purpose for which a CA can be created:

CAs should be used for the conservation of natural features on land with the aim to serve the public interest. A definition of the term ‘conservation’ should be made by including ‘the protection, restoration or enhancement’ of natural features on land.

2) An eligible holder:

The legal proposal should vest the power to create a CA in a specified governmental conservation body.

3) Land eligible to be subject to CAs:

The area eligible for the creation of CAs should be land rightfully possessed or owned by eligible persons regardless of its purposes for use or physical nature.

4) Burdened landholders:

The legal proposal should provide that landowners and others having the right over a certain plot of land (e.g. tenants) are eligible to enter into CAs with a qualified holder subject to the durations stipulated in (6) below.

5) Obligations:

The provisional text should prescribe that CAs created between CA parties may impose both positive or negative burdens subject to the conservation purposes stipulated in (1).

6) Binding duration:

The legal proposal should provide that the default binding period of CA is a perpetual term, but the parties could agree to make a time-limited CA subject to the type of burdened landholders. CAs made by landowners run with the land and bind successors in a land title, but those made by others persons having the rights on the property of another do not bind a future owner¹⁰⁷⁴ and are subject to the period of the rights over the burdened land.

¹⁰⁷³ The following suggestions are refined from the concluding remarks summarised at the end of each section in part 2 of chapter 6.

¹⁰⁷⁴ As noted in sub-section 2.5.2 of chapter 6, although CAs made by others persons having the rights on the property of another do not bind future landowners, they bind successors in the same position, e.g. as tenants.

7) CA variation and termination:

The provision should entitle CA parties to modify or terminate CA made by them by agreement. The court should have the power to decide the reasonable grounds of modification and termination where disagreement on these grounds takes place.

8) Enforcement for the breach of obligations:

The legal proposal should prescribe a civil law remedy as a means for CA enforcement. Civil remedies for enforcement should be the same as those applied for civil disputes.

9) Incentives:

A provision about incentives should be included, to the effect that a holder 'may offer' some incentives in exchange with the entry into a CA subject to the conditions under this law. The details providing what incentives can be made available to landowners should be prescribed in a regulation.

10) CA registration:

The law should provide that the creation of a CA will be valid where a landowner registers the acquisition of CA burdens in the land title document subject to the rules prescribed in a regulation. This provision is also required where the parties modify or terminate CAs.

11) Public oversight:

Since the qualified holder will be a governmental body, public oversight of CAs' implementation can be done in the same manner as other kinds of administrative operations. Hence, it is unnecessary to provide an additional rule for public oversight.

12) Applicable term

A proposed CA-enabling law should employ the term 'conservation agreement.'

13) Compatibility with the existing laws:

The provision should state that the implementation of a CA on certain land does not overrule or exclude the duties required under specific rules under existing laws. The new legal proposal should be annexed as part of nature conservation laws.

The last part of chapter 6 noted that although the legal proposal proposed by this thesis is not a fully-worked out scheme and the need for further thought on its practical

application, this study affirms that the legal proposal has various strengths, which prevail over those imperfect points. Such strengths include the introduction of a legal innovation based on the combination of C&C regulation and self-regulation, which offers an option to develop further market-based instruments and encourages new environmental governance by multiple players. However, this part noted that further research to make it ready for implementation should be conducted.¹⁰⁷⁵

In brief, it can be summarised that the legal proposal elaborated in chapter 6 is an option to conserve natural features on land and diminish the environmental problems noted in chapter 4. This thesis claims that it creates two original contributions to academia. The first is the concluding remarks on how the application of CA laws can be analysed from regulatory and legal perspectives. The second is the creation of a legal proposal for the implementation of CAs in Thailand.

2. Limitations of this research

Although arguing that this thesis made some original contribution, some limitations of this research remain and should be discussed here.

First, the very nature of the comparative analysis of law means that the research outcome is dependent on, among other things, the jurisdictions selected to compare and relevant information available at the time of conducting this research. The comparison of the laws of Australia, the UK and the USA, where their socio-economic conditions and legal systems are distinctive from Thailand, might be criticised that it leads to a research outcome similar to the legal model of western countries. Perhaps, the selection of some developing countries as the comparators might look more appropriate, and lead to an outcome that is suitable for Thailand. Nonetheless, as justified in section 4.3 of chapter 1, this thesis adopted some criteria for justifying this selection, and one of these is sufficient supporting information. Hence, this thesis sees that this selection is justifiable but there remain some limits.

Second, although the use of comparative study based on documentary research offers an opportunity to view a specific problem or issue from a theoretical perspective, it might be seen that the result uncovered by this type of research method is unrealistic.

¹⁰⁷⁵ See the limitation of this research outcome in part 2 below.

It means that this research may not be able to find the most effective way to solve a problem unless empirical research in that topic is conducted. This assertion may be partly true, but this thesis affirmed at the outset that it sought to develop a possible proposal of law based on a theoretical and doctrinal study. Hence, this thesis does not claim that the legal proposal made is necessarily the most appropriate or effective model. It merely established a possible and credible legal model which merits further elaboration by an empirical method.

Third, this thesis noted in many parts that some legal considerations remain unsolved, and this made this thesis unable to elaborate on all aspects comprehensively. For example, this thesis did not examine all dimensions of the consideration of public interest CAs might seek to serve.¹⁰⁷⁶ Also, it did not examine whether the proposed model should apply in water areas where the entitlement of property rights thereon remain unclear.¹⁰⁷⁷ Further research on what type of rights the law allows for individuals in such areas could help clarify this point. However, as mentioned in chapter 4, the legal concepts of public ownership¹⁰⁷⁸ and regulatory property rights¹⁰⁷⁹ in Thailand are not clarified well. This thesis, therefore, is unable to consider whether water areas should be conserved by CAs or not. Another aspect worthy for further study is about the efficiency and effectiveness of civil remedies used for the enforcement of CAs. This thesis is unable to thoroughly examine this due to its study scope and the research method employed. Further study might be based on a socio-economic or empirical approach.

3. The potential for further research

Although on the one hand, limitations of this research may exist, and make the conclusion in this thesis imperfect, on another, these suggest some avenues for further research to fulfil such imperfections. First, there is the opportunity to have further research in searching for the detailed answers through other research methods. The limits of this research which merely provide a preliminary answer by employing comparative analysis and documentary research indicate that there is the room to

¹⁰⁷⁶ See this acknowledgement in sub-section 2.4.3 of chapter 5.

¹⁰⁷⁷ See the identification of this point at section 2.4 of chapter 6.

¹⁰⁷⁸ See the difficulty in determining the concept of public ownership in Thailand in sub-section 2.1.4.2. See also Resta (n 434) ch 10.

¹⁰⁷⁹ See the ambiguity regarding the emergence of regulatory property rights in Godt (n 84) 13.

further investigate by considering actual practice in other jurisdictions coupled with refinement of the legal proposal by an empirical method, e.g. by consulting experts and stakeholders.¹⁰⁸⁰ Such further study might be useful in that it is an opportunity to find what the challenging issues hindering the implementation of CAs can be.

Second, if the legal proposal is carried forward, there will be room to consider the potential in applying CAs to deliver market instruments for environmental protection which require further detailed provisions. For instance, if a government adopts a policy to introduce payments for ecosystem services (PES), this research will become a pioneering paper in many aspects. It could provide a preliminary study showing how CAs can work alongside or as an independent tool to serve, what provisions should be made and whether and to what extent the legal rules creating a CA can be applied to convey PES.¹⁰⁸¹

Third, there is the room to investigate some legal issues regarded as research limitations in the above part. They include the investigations of all dimensions of public interest in the context of CAs, the effectiveness of CA enforcement as well as that relating to the application of CAs in water areas.

¹⁰⁸⁰ For example, in other jurisdictions, some empirical studies examined the willingness and ability of burdened landholders to continue the implementation of CAs to understand the perceptions of participating landowners in Australia (see Julie Elizabeth Groce, 'Private Land Initiatives for Biodiversity Conservation: The Case of Conservation Covenants' (PhD Thesis, Monash University 2018)).

¹⁰⁸¹ See the example of the guidelines in establishing PES, which are closely similar to CAs at Thomas Greiber (Ed), 'Payments for Ecosystem Services: Legal and Institutional Frameworks' (IUCN Environmental Policy and Law Paper No 78, IUCN 2009).

Appendix

The statutory provisions authorising the creation conservation easements in the USA are found in the following statutory compilations.

States	Names of conservation easement-enabling statute
States adopting UCEA	
Alabama	Code of Alabama
Alaska	Alaska Statutes
Arizona	Arizona Revised Statutes
Arkansas	Arkansas Code
Delaware	Delaware Code
Florida	Florida Statutes
Georgia	Georgia Code
Idaho	Idaho Statutes
Indiana	Indiana Code
Kansas	Kansas Statutes
Kentucky	Kentucky Revised Statutes
Louisiana	Louisiana Revised Statutes
Maine	Maine Revised Statutes
Minnesota	Minnesota Statutes
Mississippi	Mississippi Code
Missouri	Missouri Revised Statutes
Nevada	Nevada Revised Statutes
New Hampshire	New Hampshire Revised Statutes
New Mexico	New Mexico Statutes
Oklahoma	Oklahoma Statutes
Oregon	Oregon Revised Statutes
Pennsylvania	Pennsylvania Statutes and Consolidated Statutes
South Carolina	South Carolina Code of Laws
South Dakota	South Dakota Codified Laws
Texas	Texas Statutes
Virginia	Code of Virginia
West Virginia	West Virginia Code
Wisconsin	Wisconsin Statutes & Annotations
Wyoming	Wyoming Statutes
Non-UCEA states	

States	Names of conservation easement-enabling statute
California	California Civil Code
Colorado	Colorado Revised Statutes
Connecticut	Connecticut General Statutes
Hawaii	Hawaii Revised Statutes
Illinois	Illinois Compiled Statutes
Iowa	Iowa Code
Maryland	Maryland Code
Massachusetts	Massachusetts General Laws
Michigan	Michigan Compiled Laws
Montana	Montana Code Annotated
Nebraska	Nebraska Revised Statutes
New Jersey	New Jersey Revised Statute
New York	New York Laws
North Carolina	North Carolina General Statutes
Ohio	Ohio Revised Code
Rhode Island	Rhode Island General Laws
Tennessee	Tennessee Code
Utah	Utah Code
Vermont	Vermont Statutes
Washington	Revised Code of Washington

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